FILED

00 210 AUG 7 - 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court Of The United States

JEROME BERG,

Petitioner,

vs.

STATE BAR OF CALIFORNIA

Respondent

On Petition For A Writ Of Certiorari To The Supreme Court Of California

PETITION FOR A WRIT OF CERTIORARI

Robert Rudolph, Esq.
Counsel of Record
1255 Post Street, Suite 606
San Francisco,
California 94109
(415) 775-7751
Counsel for Petitioner

124pp

QUESTIONS PRESENTED FOR REVIEW

1. Is there an unconstitutional delegation of judicial authority to an administrative tribunal where no constitutional court (not even the state supreme court) provides a trial or plenary appeal review before a law license is revoked?

2. Is due process right to a full and fair opportunity to litigate denied when the licensee is not permitted any defense on a disbarment-level charge and is given only a signle hour of trial time to prove a highly-detailed "mitigation" to that charge?

3. Are due process and equal protection denied when on every issue existing rules, practice, statutes, and precedents favorable to petitioner are ignored or reversed with no explanation of why so much law must be disregarded?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....vi

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.....1

OPINIONS AND BRIEFS BELOW.....1

JURISDICTIONAL STATEMENT.....2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....2

SUMMARY STATEMENT OF PROCEEDINGS BELOW.....3

STATEMENT OF THE CASE AND REASONS FOR GRANTING THE PETITION.....7

A. Petitioner Cannot Obtain Due Process Below.....7

1. No California Constitutional Court Presently Provides In Dept. Review Disbarments.....7

2. The California State Bar

doesn't contest that Due Process and Equal protection abuses 8

3. No Independent California judiciary tries or reviews licensure cases 9

4. Lack Of A Full And Fair Opportunity To Litigate 9

5. Statutes, Rules, and Precedent were Ignored 13

6. The Fees At Issue Are Modist and Reasonable 13

7. Squelching Review Here 14

8. Establishment of the State Bar Court 15

STATEMENT OF THE FACTS 16

A. Detailed Procedural History 16

B. The Insureds Were Entitled To Independent Counsel 18

C. Two-And-A-Half Years Of Work

Excluded From Evidence in the Civil Case 20

D. No *Rest. Judgments 2d* § 29 "Unfairness" Review 21

E. No Trial On Unique Licensure Issues Goes Beyond Preclusion 22

F. Another Restructuring of the State Bar Court 23

DISCUSSION

A. In Rose the California Supreme Court redefined Review ..... 23.

B. The present California discipline system relies on deligation of judicial authority ..... 27.

APPENDIX A (Disbarment with right of recon.) ..... App. 1

APPENDIX B (Review Dept. decision) ..... App. 3

APPENDIX C (OSC in Rose) ..... App. 49

APPENDIX D (Superceeded State Bar Court order allowing trial on count one) ..... App. 50

APPENDIX E (Recon. denied 5.10.2000) ..... App. 54

APPENDIX F (Exerpted recon. pet'n.)..... App. 55

APPENDIX G (Exerpted recon. closing memo)..... App. 79

There is no App 46-48 text herein.

TABLE OF AUTHORITIES

FEDERAL CONSTITUTION

Article 1 § 9 4

FEDERAL CASES

Ashmus v Calderon, 123 F.3d 1199, 1207-8 (9th Cir. 1997) 17

Boykin v Alabama, 395 U.S. 238, 244 [98 S.Ct. 1709, 1712] (1968) 14

Freytag v. Comm., 501 U.S. 868 (111 S.Ct. 2631) (1991) 14, 29

Fieger v. Thomas, 74 F. 3d 740 (6th Cir. 1996) 14

Gianni v. Real, 911 F 2d (1990) 18

Green v McElroy, 360 U.S. 474, 492 [79 S.Ct. 1400, 1411] (1959) 2

Harper v Virginia Bd. of Elections, 383 U.S. 663, 665 [86 S.Ct. 1079, 1080] (1996) 2

Hirsh v. Justices, 67 F. 3d 708 (9th Cir.1995) 15

In Re Ruffalo (1968) 390 U.S. 544, 550 [88 S.Ct. 1222, 1226].....3

Koningberg v State Bar of California, 353 U.S. 252, 287 [77 S.Ct. 722, 734] (1957).....15,26

Mathews v. Eldridge (1976) 424 U.S. 319 [96 S.Ct. 893].....2

McGuthra v California (1970) 402 U.S. 183, 268 [91 S.Ct. 1454, 1498].....14

Napa Valley Co. v. R.R. Comm. (1920) 251 U.S. 366 [40 S.Ct.174].....26

Rinaldi v Yeager, 384 U.S. 305, [86 S.Ct. 1497] (1966).....2

U.S. v Raddatz, 447 U.S. 667, 683 [100 S.Ct. 2406] (1980).....2

Younger v. Harris, 401 U.S. 37 [91 S. Ct. 746] (1917).....14

CALIFORNIA CONSTITUTION

Cal. Const. Art. VI.....5

Cal. Const. Art. VI, § 14.....4, 10

CALIFORNIA STATUTES

Business & Professions Code § 6079.1(a) 9

Business & Professions Code § 6086.5 18

Civil Code § 2860 4

Code of Civil Procedure 1668 20

Code of Civil Procedure §1029.8 20

Evidence Code § 115 16

Evidence Code § 115 9

Insurance Code § 253 20

Insurance Code § 533 20

CALIFORNIA RULES OF PROF'L. CONDUCT

Rules of Professional Conduct 5-101 23

Rules of Professional Conduct 5-102 23

Rules of Professional Conduct Rule 3-310(a) 23

Rules of Professional Conduct Rule 3-310(e) 23

Rules of Professional Conduct Rule 4-101 23

CALIFORNIA STATE BAR COURT RULES

Rule 214 ..... 9, 16

CALIFORNIA CASES

Assurance Co. of America v Haven (1995) 32 Cal. App. 4th 1208 [49 Cal. Rptr. 25] 22

Edmondson v State Bar (1981) 29 Cal.2d 339, [172 Cal.Rptr. 899, 901] 13

In Re Attorney Discipline System (1998) 19 Cal. App. 4th 582 [79 Cal. Rptr. 2d 863] 24

In Re Menna (1995) 11 Cal. 4th 975 [Cal. Rptr. 2d 620] 7

In Re Morse (1995) 11 Cal. 4th 184 [144 Cal. Rptr. 2d 620] 7

In Re Rose on Discipline (2000) 22 Cal. 4th 430 [Cal.Rptr.2d] 1, 2, 7, 16, 27

Maltaman v. State Bar (1987) 43 Cal. 3d 924, [239 Cal. Rptr. 689] 13

Obrien v. Jones (2000) 23 Cal. 4th 40 [96 Cal. Rptr. 2d 2051] 9

Taylor v. Superior Court (1970) 24 Cal. App. 3d 890 [157 Cal.Rptr.693] 19

MISCELLANEOUS AUTHORITIES

In Re Paguirigan on Discipline (S076968) 8

In Re Bar Counsel v. Bd. of Overseas, 420 Mass. 6 [647 N.E. 2d 1182] (1995) 10

Grievance Administrator v. Rostach (1998) 457 Mich. 289 [577 N.W. 2d 452] 15

id. v. Hiller (1998) 457 Mich. 258 [577 N.W. 2d 449] 15

id. v. Deutch (1997 455 Mich.149 [565 N.W. 2d 369] 15

In the Matter of Applicant A (Cal. State Bar Court Review Dept. 1995) 3 Cal. St. Bar Ct. Rptr. 318 ..... 10, 12

MISCELLANEOUS AUTHORITIES

Los Angeles Daily Journal October 10, 1996 pp. 10-11 9

Rest. Judgments 2d § 27 11

Rest. Judgments 2d § 29 ..... 5, 9,

Shorter Oxford English Dictionary 24

Witkin, Summary of Cal. Law, 9th Ed 5

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Jerome Berg respectfully petitions for a writ of certiorari to review the recent denial of reconsideration of his disbarment order from the Supreme Court of California, which is the only state constitutional court involved in disbarments. For the last decade, well documented cases of abuse of due process and equal protection were treated not as "causes" (proceedings in court, a suit or action, i.e., matters which receive more substantial attention)[1], but were disposed of as a line items on its motion calendar. Although the facts here document a miscarriage of justice, there is no effective review of the recommendations from its administrative licensure court.

OPINIONS AND BRIEFS BELOW

Appended are the unpublished March 25, 1998 disbarment order of the Supreme Court of California (App. 1A at 1), the decision of the Review Department of the California State Bar Court. (App. B at 3), the order to show cause in In Re

---

1 In Re Rose on Discipline, 22 Cal. 22 Cal. 4th 430, 452 [93

Rose on Discipline (*Supra.*) (App. C at 49), the early order of the State Bar Court which denied preclusive effect to the prior (unfair) civil court judgment (App. D at 50), the May 10, 2000 order denying reconsideration. (App. E at 54), an excerpt of the motion for reconsideration (App. F at 55), and an excerpt of the closing brief both presenting Federal issues. (App. G at 79)

JURISDICTIONAL STATEMENT

The California Supreme Court entered its disbarment order with right to seek reconsideration without opinion on March 25, 1998 (App. 1). A request for reconsideration was denied May 10, 2000 (App. 54). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A constitutional court cannot delegate its jurisdictional power to a legislatively created tribunal. U.S. v Raddatz (1980) 447 U.S. 667, 683 [100 S.Ct. 2406, 2416] The right to practice one's profession is a liberty right within the 14th

---

Cal.Rptr. 2d 298)]

amendment's protection. Green v McElroy 360 U.S. 474, 492 [79 S.Ct. 1400, 1411] (1959). The level of due process entitlement is consistent with the burden of the potential loss (Mathews v Eldridge (1976) 424 U.S. 319 [96 S.Ct. 893]) including a "meaningful opportunity to be heard". In Re Ruffalo (1968) 390 U.S. 544, 550-551 [88 S.Ct. 1222, 1225-1226].

Equal protection requires law to be applied "with an even hand." Rinaldi v Yeager (1966) 384 U.S. 305, 310-311 [86 S.Ct. 1497, 1501]. ". . . [t]hose similarly situated [must] not be treated differently unless the disparity is justified." Harper v Virginia Bd. of Elections (1996) 383 U.S. 663, 665 [86 S.Ct. 1079, 1080].

Article 1 § 9 of the United States Constitution forbids legislative impairment of contracts.

SUMMARY STATEMENT OF PROCEEDINGS BELOW

Petitioner was licensed to practice law in California in 1959. Cal. Bus. & Prof. Code § 6125 requires attorneys to be members of the State Bar. The California State Bar Court recommended his disbarment. (App. 2). The California

Supreme Court never provided oral argument or a written analytic opinion; it disposed of that recommendation and the March 24 2000 petition (App 55) for reconsideration on its motion calendar.

The State Bar Court gave preclusive effect to a fraud judgment in an underlying civil case brought against petitioner by TDIC (a third party payer insurance company) over legal fees in over 40 litigated cases in which he was defendants' independent counsel. In that civil case petitioner was denied a reasonable defense when evidence of half of the work done for those fees was held inadmissible based on an erroneous reading of a very high threshold for independent counsel into a then new statute (Cal. Civil Code § 2860) which codified the common law right to independent counsel when attorneys engaged by an insurance company to defend an insured are in conflict of interest with the insured. The error required "direct evidence" of conflicts (not the statute's language, "a possible conflict may arise"). Petitioner had no such direct evidence, but there was inherent conflict. (See ft. nt. 10 hereof). The State Bar Court made no examination as to: 1) whether the issues raised

in Count One (an unconscionable fee charge) were identical to those in the civil case[2] or 2) whether petitioner's written offer of proof in the State Bar Court demonstrates the result in the civil case was unjust. *Rest. Judgments* 2d § 29.

The evidence of 2 1/2 years of work excluded from the civil case was permitted in the State Bar Court only for mitigation -- about 90 seconds for each of over 40 complex litigated cases in which petitioner's fees were disputed. (Note

---

[2] The civil case charged petitioner with common law fraud (App. 4) which is proved by a) a misrepresentation, b) scienter, c) intent to defraud, d) justifiable reliance, and e) damages. Witkin, Summary of California Law , 9th Ed. Torts § 676. Full performance obviates damages and exculpates the accused. The State Bar Court Review Dept. overlooked (at App. 16) the unfairness in the civil case of petitioner's lack of a fair opportunity to prove he did all the work, thus he was unfairly found fraudulent. At App. 15 & 16 the Review Department is confused in its statement that the civil case presents as a congruent issue "the propriety" of petitioner's billing; "property" of billing is a subject unique to the discipline case. As seen in this footnote, App. 16 is clear error in its holding, "the issues [in the civil case and the discipline case] are identical..." Lack of a trial didn't prevent the Review Dept. from finding petitioner's "...billing scheme is disciplinable." If so why did the unfair civil judgment have to receive preclusive effect? And why wasn't the case in chief on count one opened to allow evidence on TDIC's position about advance billing? (See App. 20). And why does "pleadings received" mean "on their face" such bills represented "that the work had been performed" (what work)? (App. 20).

petitioner's identification of this issue below at App. 8 and the Review Dept.'s discussion at App. 24 & 25). Federal questions identified in the March 24, 2000 petition for review are highlighted here with references to App. 55 and higher. (Such as failure to follow Rest. Judgments, 2d §§ 27 & 29 precedent at App. 66, the one hour limit on mitigation at App. 68, rewriting Civ. Code § 2860 at App. 69, ignoring precedent about a lawyer's unrelated testimony at App. 73, ignoring benefit of doubt precedent at App. 74, requiring objection to a cost bill to be filed before the bill is served at App. 77)

Every statute, court rule, and precedent favorable to appellant was ignored or distorted in the State Bar Court.

The California Supreme Court ordered disbarment early in 1998 without according petitioner oral argument and without an opinion on the issues, but allowed a petition for reconsideration following its decision in the pending case of In Re Rose on Discipline (*supra.*). (App. 1)

Within 90 days of the within petition the California Supreme Court refused to grant reconsideration, again without an explanatory opinion. (App. 54)

Petitioner requests judicial notice of his return to this court's disbarment Rule to Show Cause in D-1958, which reviews the factual background in more detail.

This petition presents new acknowledgments by the California Supreme Court of its refusal to give in depth review in three decisions it published in the first half of 2000.

STATEMENT OF THE CASE AND REASONS FOR GRANTING THE PETITION

A. Petitioner Cannot Obtain Due Process Below

1. No California Constitutional Court Presently Provides In Depth Review Of Disbarments

Since 1991 the California Supreme Court has not performed the plenary evaluation and adjudication function while disbarring lawyers. Since then only 3 licensure cases obtained reasoned opinions: In Re Morse (1995) 11 Cal. 4th 184 [144 Cal. Rptr. 2d 620], In Re Menna (1995) 11 Cal. 4th 975 [Cal.Rptr. 2d 620], and In Re Rose (*Supra.*) [3] It has delegated that responsibility entirely to an administrative

---

[3] The constitutional court must make the ultimate decision. See U.S. v Raddatz, 447 U.S. 667, 683 [100 S. Ct.. 2406, 2416] (1980).

"State Bar Court"[4] established by statute. It accords only cursory "motion" type review. In the past decade it never criticized due process abuse by the State Bar Court, even when startlingly unjust cases (like petitioner's) were presented. At the end of 1997 in Rose (*supra.)* the California Supreme Court ordered the State Bar to brief whether it has an obligation to give "plenary review" and if so on what standards (App. 49). The California Supreme Court's opinion in Rose (*supra.*), denied, over a strong dissent, that it delegates its review power to the State Bar Court. To date the California Supreme Court has not published criteria or methods of its oversight of the State Bar Court or its process of review without a written opinion. Its only publication in these matters is the weekly list of review denials entered on its motion calendar.

2. California State Bar Didn't Contest Due Process And Equal Protection Abuses

In a case awaiting hearing in the California Supreme Court, In Re Paguirigan On Discipline (S076968), where petitioner is the only *amicus,* the State Bar was unable to refute

---

[4] Cal. Const. Art. VI lists the state's courts of record. That

proofs of the procedural abuses leading to a miscarriage of justice in his case which petitioner presents herein, (See App. 81 & 82) and it never refuted those claims when presented again in petitioner's *amicus* brief in Obrien vs. Jones, 23 Cal. 4th 40 [96 Cal.Rptr. 2d. 2051].

3. No Independent California Constitutional Judiciary Tries Or Reviews Licensure Cases

The California State Bar Court judges lack independence. (Cal. Bus. & Prof. Code § 6079.1(a). In mid 1995 five of the eight California State Bar judges whose original six year terms expired were not re-appointed without explanation. The *Los Angels Daily Journal* October 10, 1996 pages 10 and 11, called that change of the court's membership "the fourth of July massacre." New judges were appointed.

4. Lack Of A Full Fair Opportunity To Litigate/Violation Of Due Process, And Equal Protection

This purge made a dramatic difference in petitioner's case. In the State Bar Court petitioner asked for review of the civil trial under *Rest Judgments* 2d § 29 for unfairness before

---

court is not on the list.

preclusion was imposed in count one (the unconscionable fee charge). This was a proper request under previous California State Bar Court practice. See In the Matter of Applicant A (State Bar Review Dept. 1995) 3 Cal. St. Bar Ct. Rptr. 318, 324. 329, Rest Judgments 2d §§ 27 and 29; see Bar Counsel v Bd. of Overseers, 420, Mass. 6 [647 N.E. 2d 1182] (1995).

The State Bar Court judge originally assigned made a pre-trial ruling that petitioner could present evidence in defense to count one (the disbarment level unconscionable fee charge) on the unfairness of the civil trial based on published case law. (App. 50-52) In the State Bar Court petitioner filed a 44 page declaration and a detailed legal brief both indexed to the civil case trial transcript which demonstrated the abuse. However, the original trial judge was not reappointed, and the newly-appointed trial judge vacated her ruling stating, "I'm not going to rule on whether you had a fair trial" (quoted at App. 18 with approval)". . . we decline to deal with [that unfairness] issue . . ." which is a clear rejection of Applicant A's fairness test.

The State Bar Court did not permit a defense in the

case-in-chief on the unconscionable fee charge, it only allowed a "mitigation" opportunity to prove petitioner's two-and-a-half years of work (on over 40 complex litigation cases plus other work) which had been excluded from the civil case because the new statute was misinterpreted, but this mitigation was limited to an obviously inadequate singe hour[5] That order was made after petitioner submitted a 26 page single-spaced chronology of the developments in those 40 plus cases (trial exhibit N) with over 400 references to documents in evidence in the State Bar Court case prepared by other lawyers in those cases which highlight work by petitioner including more than 200 references about which he was not allowed to testify in the civil case and which he had expected to testify about the State Bar Court to prove that no harm was done because his clients had pre § 2860 contractual rights to his unconflicted representation, and

---

[5] When challenged for bias due to this one hour ruling the State Bar Court trial judge misrepresented in an unsworn writing that he only suggested one hour. The State Bar Court Review Dept. called "commendable" (App. 24) his chopping that presentation to one hour. The State Bar Court trial judge's misrepresentation on this fundamental due process issue exposes his subjective evaluations to question for bias and dishonesty.

he did all the work for which he billed and was paid.[6] Petitioner testified in the State Bar Court that he did the work and expended the hours for which he billed. There was no evidence to the contrary. No harm is a mitigation defense allowed by California State Bar Court Standards for Attorney Sanctions for Professional Misconduct, Standard 1.2(e)(iii). The record in the civil case which was in evidence in the State Bar Court included three independent sources to prove that work: bills of other lawyers which mention petitioner in connection with various parts of the job, papers signed by petitioner, and the testimony of one client who described petitioner's work. That client's work extended through the 2 1/2 years excluded from the civil case.[7]

---

6 The Review Dept. finding that this exhibit outlined petitioner's work (App. 23) expresses its misunderstanding of (exhibit N) which could not have occurred if the exhibit had been examined during the appeal.

7 The Review Department's finding on this point (at App. 38-39) neglects to credit those independent sources of petitioner's proof of performance, "There is no clear and convincing that the work was ever performed. . . ." (App. 38) or that there was no contrary evidence specifically on this point. (See Edmonson (Supra.))

5. Statutes, Rules, And Precedent Were Ignored

After limiting petitioner's mitigation to a single hour the State Bar Court judge ruled and the Review Dept. agreed petitioner must establish mitigation by "clear and convincing" evidence (App. 38) in violation of California State Bar Court Rules of Procedure, Rule 214 and California Evidence Code § 115 (which sets the level at a "a preponderance" of the evidence). It also rejected the benefit of the doubt standard documented in Maltaman v State Bar (1987) 43 Cal. 3d 924, 931, 932 [239 Cal. Rptr. 687, 689], "We must weigh the evidence ourselves, resolving all doubts in the attorney's favor", and Edmonson v State Bar (1981) 29 Cal. 3d 339, 345, [172 Cal. Rptr. 899] that the accused lawyer's unrefuted testimony can not be "arbitrarily disregarded".

6. The Fees At Issue Are Modest And Reasonable

The total fees petitioner received for almost 5 years of work in more than 40 civil suit defenses, over 200 pre-litigation claims, and several administrative tribunal matters averaged $8,500 per litigation case and nothing for the other work. One litigation case in evidence at the State Bar Court trial (Dr. S,) in

which petitioner's work was entirely billed on a task basis and was completed quickly produced over $10,000 in fees showing the fees in the other 40 plus similar cases of $8,500 were not unconscionable.

7. Squelching Review Here

By not writing opinions the California Supreme Court makes it nearly impossible to cross this court's review threshold of federal law violation. See the dissent of Brennan, J., in McGuthra v California (1970) 402 U.S. 183, 268, [91 S.Ct. 1454, 1498], and Boykin v Alabama 395 U.S. 238, 244 [98 S.Ct. 1709, 1712] (1968) regarding the due process right to a record "adequate for any review . . . ." In Rose (at 447) the California Supreme Court relies on Fieger v Thomas 74 F. 3d (6th Cir. 1996) in which Younger v Harris, 401 U.S. 37 [91 S. Ct. 746] (1971) abstention was imposed where the attorney sought injunction before he submitted to an administrative discipline hearing which was only reviewable in the discretion of the only available constitutional court, (the Michigan Supreme Court) finding its discretionary review of disciplinary decisions rendered by that court's Attorney Grievance

Commission "provides an adequate opportunity to present federal claims in state court". Fieger does not include a history of ignored due process and equal protection abuses such as are clearly documented here.

The Michigan Supreme Court continues to publish analytic opinions in attorney discipline cases. See Grievance Administrator v Rostach (1998) 457 Mich. 289 [577 N.W. 2d 452], *id.* v. Hiller (1998) 457 Mich. 258 [577 N.W. 2d 449], and *id.* v Deutch (1997) 455 Mich. 149 [565 N.W. 2d369].

8. Establishment Of The California State Bar Court

As originally conceived in 1988 (Cal. Bus. & Prof. Code § 6086.5) the California State Bar Court was to be a neutral forum guided by the California Supreme Court's precedents issued in about 20 major decisions in licensure cases each year through 1991. The previous system was approved in Koningberg v State Bar of California (1957) 353 U.S. 252, 287 [77 S. Ct. 722, 734], before review in the California Supreme Court effectively ended. Hirsh v Justices, 67 F.3d 708, 713 (9th Cir. 1995) was decided without any reference to the then unknown fact that the California Supreme Court had decided

not to provide plenary review to attorney discipline cases and had not published one review between the end of 1991 and mid 1995, nor did the Hirsh plaintiffs submit evidence of any "patently unconstitutional violation" (709) such as those presented herein.

II. STATEMENT OF THE FACTS

A. Detailed Procedural History

Petitioner was charged in a three-count State Bar disciplinary notice to show cause. Count two is a minor charge regarding a technical trust fund violation (a short delay in disbursement, App. 5) which if fully established would not call for a disbarment discipline. Petitioner prevailed on Court Three.(App. 5 & 6)

The case which could justify disbarment (count one) accuses petitioner of "charging or collecting an unconscionable fee."(App. 5) Count one was decided preclusively on a detailed "special verdict" (App. 4) in a California civil case in which petitioner was found to have committed fraud on The Dentists Insurance Company (TDIC) which was a third party payer for petitioner's services as "independent counsel" to

three of that company's insureds. Petitioner contends that judgment should not be given preclusive effect because it was obtained unfairly (as outlined herein and noted at App. 8).

Petitioner and TDIC had no agreement about billing. (See App. 9) Petitioner originally billed by task on an hourly basis. Later as the need for trial preparation became clear he was inundated with copies of files from the insurance company's designated lawyers who had preceded him in that litigation. He billed in advance on the anticipated volume of work as projected upon the quantity of pleadings he received.[8] Some days he received over 24 hours of work because numerous ten-ream boxes of papers (each holding 5,000 pages) were delivered to him and logged on the same day into the billing system. (App. 10) The advance bills are conspicuously different from the former itemized task billing because most of them only state line after line only "pleadings received" (contrary to App. 10 which again reflects the Review Dept.'s

---

[8] Comparable pay even to the approximate hourly value and the fee based on the volume of the record is given to defense attorneys appointed in death case appeals by the California Supreme Court. See its fee schedule at West, Cal. Codes Vol. 23 Pt. 3 p.5 et seq. and see Ashmus v Calderon 123 F.3d 1199, 1207-8 (9th Cir.

failure to examine the evidence or quote it correctly.) TDIC's claims officers who received the bills never telephoned or otherwise inquired about the advance bills or petitioner's increasing the rate by $25 per hour (See App. 9) despite the fact that reviewing attorney fee bills and paying claims is their only professional function.

After petitioner was paid, the California Legislature enacted a new statute (California Civil Code Section 2860). Relying on that statute TDIC wrote "cut-off" letters to petitioner announcing it would not be responsible for his fees after the effective date of the letters[9].

B. The Insureds Were Entitled To Independent Counsel

Petitioner believed his clients (three dentists sued for malpractice and intentional torts not covered by their insurance) were entitled to his continuing representation to the

---

1997) for proof the fee is to low to attract attorneys.

[9] The Review Dept. (at App. 18 & 24) appears to believe that the insurance company can fire the insureds' independent counsel regardless of conflicts with the insurer's selected attorneys. That ruling is wrong for two reasons, first, employment wasn't provided through the insurer (--"respondent has defrauded his employer," App. 14.), and second, by law the insureds had the right to unconflicted counsel at TDIC's expense to the end of their cases.

end of their cases. For this reason he continued as their counsel-of-record while TDIC's usually-selected defense counsel continued to represent the interest of TDIC which were in conflict with interests of petitioner's clients.

TDIC's lawyers were in conflict because charges against petitioner's clients included claims of injury due to unlicensed practice in violation of health care licensing statutes and intentional acts for which California law forbids indemnification by an insurance company. If those cases were mismanaged to result in such outcomes TDIC would save money because they wouldn't have to pay people injured by the insured dentists[10]. The dentists would have to pay out their own pocket.

---

10 California law forbids insurance indemnification for injuries resulting from violations of the medical and dental practice acts. See California Insurance Code § 253 and California Code of Civil Procedure § 1029.8. Willful torts are excluded from indemnification by California Insurance Code § 533 and by California Code of Civil Procedure § 1668. See the willful acts discussion in Taylor v Superior Court (1970) 24 Cal. 3d 890, 905 [157 Cal. Rptr. 693, 702, 704. In an unguarded statement on the record during the State Bar trial (at II 33:21-24) the State Bar judge said he recognized that there was a conflict-of-interest between [petitioner's clients and TDIC's selected lawyers. That statement highlights the Review Dept.'s. twisting the unfairness test of Applicant A (*Supra.*) at (App. 15 to 18).

C. Two-And-A-Half Years Of Work Excluded From Evidence In The Civil Case

In pretrial proceedings the California trial level court held that §2860 could properly impair the dentists' pre-existing contractual rights to "independent counsel" regardless of the conflicts,[11] and for that reason petitioner was forbidden to introduce evidence of 2 1/2 years of work he did after receiving TDIC's "cut-off" letters. At trial in that civil fraud case petitioner was also forbidden to adduce the customary evidence of the nature and purpose of the work permitted when lawyers and payers have a fee dispute. TDIC's counsel was permitted the dishonest argument that petitioner did no work. Neither the California Supreme Court nor this court granted review[12]

---

[11] The California Court of Appeal side-stepped that Art. 1, § 9 federal constitutional issue by deciding there was no need for independent counsel because the conflicts were not proved by "clear and convincing" evidence which is not the standard ("a possible conflict") established by § 2860. (App. 13 ignores this fact.), Petitioner was excoriated (App. 41 to 43) for "unwillingness to accept the judicial process" (App. 43) which Applicant A allows to be reexamined for unfairness) for insisting the statute was misread.

[12] The State Bar Court and the State Bar Review Dept. mentioned this lack of review several times in justifying their

D. No *Rest. Judgment* 2d § 29 "Unfairness" Review

At petitioner's request the entire clerk's and court reporter's transcript of the civil case were admitted into evidence by the State Bar Court. (The Review Dept.'s. careless examination of the evidence is demonstrated by its error on this point at App. 6) Petitioner filed an extensive, sworn, fact declaration as well as a lengthy legal memorandum which described the unfairness of the prior civil case in meticulous detail with copious citations to the record and published authority.

E. No Trial On Unique Licensure Issues

After giving preclusive effect to the civil judgment, the State Bar Court trial judge then made some new findings of fact adverse to petitioner on disputed issues in count one based on facts which the jury never resolved on the conflicting evidence because they were irrelevant in the civil case[13]. No defense was

---

decisions (see App. 13, 18, and 41 ". . . a final determination has been made of his fraudulent conduct.") although both California law and Federal law hold that lack of review is not an expression upon the merits of the case.

[13] Petitioner's files were not in evidence at either trial. No percipient witness corroborate the false findings, about his files at App. 11. The duplicate pleadings are printed form interrogatories

permitted in the State Bar to count one on issues which the civil case jury didn't decide. The State Bar Court decided against petitioner on every point where the evidence was in conflict, and made findings not supported by the record. The State Bar Review Department did not comment on the invented facts, the facts which favor petitioner (like $140,000 in uncontested itemized billing by attorneys employed by petitioner which are in evidence but for which no credit is given at App. 15), or the ignored published rules, statutes, and California Supreme Court precedents. The Review Department made a rule unique to this case: that independent counsel is the third party payer's fiduciary (App. 21) ". . . the insurance company. . . stood in the shoes of the dentist." This conflicts with precedent, the California Rules of Professional Conduct Rule 4-101, 5-101, and 5-102 (former Rule 3-310(a), (the conflict-of-interest rule), and former Rule 3-310(e) (the third party payer rule), as well as Civil Code § 2860. See Assurance Co. of America v Haven (1995) 32 Cal. App. 4th 1208 [49 Cal.Rptr. 25] rev. denied.

---

for which petitioner helped his clients prepare individual answers, and motions in the various cases which required individual study and response.

F. Another Restructuring Of The State Bar Court

The California legislature restructured the State Bar Court modifying Cal. Bus. & Prof. Code § 6079.1(a) effective November 1, 2000. This took part of the California Supreme Court's prior exclusive control over the selection of State Bar Court trial level judges, and gave the power to appoint 3 of the new structure's 5 member trial department one each to the Governor, the Speaker of the state's legislative lower house and the State Senate's President Pro Tempore. In Obrien v Jones, (Supra.) the California Supreme Court accepted the legislature's new statutory scheme with its implied criticism.

DISCUSSION

A. In Rose California Supreme Court Redefined Review

At the close of 1997 in In Re Rose (*supra.*) the California Supreme Court ordered the California State Bar to brief ". . . both whether there is a constitutional requirement for plenary consideration and the criteria the court may use in determining whether plenary review should be accorded" (App. 49) to attorneys recommended for disbarment by the California State Bar Court. The 2000 Rose decision does not discuss the

meaning of "plenary" review. The word "plenary" means "full scope". (See Shorter Oxford English Dictionary).

In Rose (at 436) by deciding that its skimpy review in these matters doesn't make them a "cause" the California Supreme Court side steps the state constitution's requirement of a written opinion (Cal. Const. Art. V § 14) but, its unexplained "review" process which evidently never reaches criticism of patent miscarriages of justice through due process and equal protection denial by the State Bar Court inexplicably "satisfies the requirements of due process" (*id.* 439), a claim the Rose dissenters refuse to accept at face value.

Compare this shallow "review" examination to the adequate procedure standard of Mathews (*Supra.*).

In In Re Attorney Discipline System (1998) 19 Cal. 4th 582 [79 Cal. Rptr. 2d 863], the California Supreme Court appears to have acknowledged its delegation of power to the State Bar Court (An issue raised at App. 80). Consider its statement (at 607) that it would provide "appropriate oversight" to the discipline system comparing its pre-1991 allocation of "a considerable portion" of its resources to the

discipline system which since the State Bar Court was established it "has been able to reduce considerably". (*id.* 610) That reduction of oversight led to its acknowledgment in footnote 17 (*id.* 611), that "we do not, of course, know the composition of the present backlog" of discipline cases in the system, and (at 618-619) return to a system using volunteers "would provide less consistent services to the court and would require it to increase its oversight [to the discipline system] to a level far greater than presently exercised".

In Rose the California Supreme Court says it undertakes an independent determination whether the attorney should be discipline as recommended by the State Bar Court, but it still doesn't provide a satisfying explanation about how it can make such a determination in petitioner's case without exploring whether petitioner did all the work and no harm was done and how it can approve a ruling that requires objection to a fee claim to be filed before that claim was presented leaving the impression that either due process violations were approved (justifying this court's intervention) or that an undisclosed standard for disbarment was imposed without a full and far a

hearing on that issue (another due process violation).

In Koningberg v State Bar (1957) 353 U.S. 252, 253-258 [77 S.Ct. 722, 723-726] this court concluded over a vigorous dissent that the California Supreme Court's denial of review of a discipline recommendation by a non-constitutional discipline entity without an opinion nevertheless "indicated that [it] had considered the merits of applicant's federal claims". In Napa Valley Co. v R.R. Comm. (1920) 251 U.S. 366, 373 [40 S.Ct. 174, 176] this court held that as to a constitutional state entity with power under Cal. Const. Art. IX § VI to conduct hearings and render decisions relevant to that suit, summary denial of review without opinion "did not affect the quality of its decision or detract from its efficacy as a judgment upon the questioned presented ...." The State Bar Court is supported by no such constitutional foundation.

Koningberg's conclusion which arises in an environment of regularly published discipline opinions of the California Supreme Court can not reasonably be stretched to cloth a system in which almost no discipline opinions of the California Supreme Court are published, no review audit trail is published,

the State Bar judges are untenured, and in Atty. Discipline System (*Supra.*) and Rose (*Supra.*) the California Supreme Court acknowledged it has cutback its oversight.

In the next section the California Supreme Court's failure to actually provide "full scope" review is seen by the Rose dissenters as an unconstitutional delegation of judicial authority to an administrative (legislatively created) "court" leaving a disbarred lawyer no right to a hearing or even an analytic opinion with no hearing by a constitutional court of "honest-to-God judges" in the words of dissenting Justice Brown (at Rose 469).

B. The Present California Discipline System Relies On Delegation Of Judicial Authority

Since 1991 California Supreme Court has not provided oral argument and a written analytic opinion in any case of serious attorney discipline, except for two cases in the mid 1990[14], and Rose (*Supra.*) As the California Supreme Court majority state in Obrien v Jones, 23 Cal. 4th 40, 52 [96

---

14 In Re Morse (*supra.*) and In Re Menna (*Supra.*)

Cal.Rptr. 2d 205] (2000)[15] its orders imposing serious discipline upon attorneys "[rely] upon the decisions and recommendations of [The State Bar Court] hearing judge". The cited sentence appears in a context which rejects the Obrien petitioners' claim that the legislation violates the separation of powers doctrine because the California Supreme Court can not rely on decisions of State Bar Court judges they didn't appoint. At *Id.* 53 the court explains that as to the new method of appointment of State Bar Court Judges, "we [The California Supreme Court] can continue to have confidence in and to rely upon the decisions of these judges". (Emphasis added.)

The within petition contends that despite that California Supreme Court's decision in In Re Rose on Discipline, (*Supra.*) in which the majority proclaims actual review is given to the discipline recommendations of the California State Bar Court, the contrary statements of dissenting judges of that court establish that the present procedure of the California Supreme Court in attorney disbarments to deny review with one line

---

15 Obrien holds that the California legislature has modified the process of selecting trial judges of the California State Bar Court without violating the separation of powers doctrine.

orders and no analytic explanation fails to meet federal due process standards[16]. The result of the reliance expressed by the California Supreme Court is that there has been de facto delegation of the California Supreme Court's judicial power to the contract judges of the State Bar Court whose work is reviewed, at best, as line items on the court's weekly motion calendar. While this skimps due process, the California Supreme Court has resisted the suggestion petitioner made in his Rose *amicus* brief that plenary review of the State Bar Court's decisions could be delegated to California's constitutional courts of appeal as authorized by Cal. Bus. & Prof. Code § 6082.

Dissenting Justice Kennard points out in Obrien (*id.* 69), "...Duties of [State Bar Court] hearing judges involve ... making written findings and recommendations", which are judicial functions (citing Freytag v Comm., 501 U.S. 868 [111 S. Ct. 2631, 2645] (1991)).

Justice Kennard continues (*id.* 70) that the governor or

---

16 See dissent of Kennard *id.* 461: "attorneys are the only persons whose state occupational licenses can be revoked or suspended without a judicial hearing."

the legislature could decline to reappoint State Bar judges "who exercise judicial powers in a fashion unsatisfactory to the [appointing officer(s)]". At oral argument in Obrien the Chief Justice mentioned the California Supreme Court's 1995 replacement of 5 of the 8 members of the State Bar Court.

In her Obrien dissent (*id.* 78) Justice Brown pierces the weakness of the California Supreme Court's reliance on decisions of the State Bar Court: "... judicial control can not practically be divorced from the power to find facts". That observation, in the context of the California Supreme Court's reliance on the decisions of the State Bar Court discussed above, highlights the constitutional defect in the present California Supreme Court's attorney discipline system as it applies to petitioner's matter.

Respectfully submitted,

Robert Rudolph, Esq.

Appendix A

SO64786

SBC No. 92-O-11504, 92-O-14486 (Cons.)

IN THE SUPREME COURT OF CALIFORNIA

IN RE JEROME BERG ON DISCIPLINE

The appendix to the petition for writ of review is ordered stricken. The request for judicial notice is granted. Both the motion to augment the petition or for plenary consideration and the petition for writ of review are denied without prejudice to seeking reconsideration in the event the court determines in *In re Rose on Discipline,* S062859, that there is a right to plenary judicial review of recommendations for attorney discipline.

It is hereby ordered that Jerome Berg be disbarred from the practice of law and that his name be stricken from the roll of attorneys. He is also ordered to comply with rule 955, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the date this order is effective.* Costs are awarded to the State Bar pursuant to Business and Professions Code section 6086.10 payable in accordance with Business and

Professions Code section 6140.7, as amended effective January 1, 1997.

* See Business and Professions Code section 6126. subd. (c).

/S/ Chief Justice George

Appendix B

PUBLIC MATTER -- DESIGNATED FOR PUBLICATION

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter Of	92-0-11504
JEROME BERG,	92-0-11486
A Member of the State Bar.	(Consolidated)
	OPINION AND ORDER
	ON REVIEW

I. INTRODUCTION

Respondent Jerome Berg has been charged with three counts of professional misconduct. Count one charged respondent with over billing The Dentists Insurance Company (TDIC) while acting as Cumis counsel[1] for TDIC's insureds in 41 malpractice actions filed against dentists covered by TDIC malpractice insurance. Prior to the commencement of these

---

[1] San Diego Federal Credit Union v. Cumis Ins. Society Inc. (1984) 162 Cal.App.3d 358 requires an insurer to pay for retained independent counsel for the defense of a lawsuit against the insured, where the insurer reserves the right to deny coverage at a later date when punitive damages are in

State Bar Court proceedings, TDIC filed a superior court action against respondent alleging causes of action for fraud and deceit, negligent misrepresentation, breach of oral contract, breach of the covenant of good faith and fair dealing, restitution, and money had and received. Following a 12-day trial, a jury awarded compensatory damages to TDIC in the sum of $282,024.86. In addition to entering judgment on the jury's award, the court awarded costs to TDIC.

In answer to three special interrogatories, the jury also found, by clear and convincing evidence, that respondent had acted with oppression, malice, and fraud. That judgment was affirmed in the Court of Appeal, and review was denied by the California Supreme Court and the United States Supreme Court.

In reference to his billing of TDIC (count one), respondent was found by the hearing judge to have committed dishonest acts in violation of Business and Professions Code section 6106,[2] prohibiting an attorney from committing an act

---

issue and the insurer denies coverage for punitive damages.

[2] References to section are to sections of the Business and Professions Code.

involving moral turpitude, dishonesty or corruption as well as a violation of rule 2-107 of the former Rules of Professional Conduct of the State Bar (effective January 1, 1975 to May 26, 1989),[3] (now rule 4-200 with some changes). That former rule prohibited charging or collecting an illegal or unconscionable fee.

Count two arises out of two separate engagement letters between respondent and Linda Reynolds Miller (Reynolds) and respondent's withdrawal of funds from his trust account that represented a portion of the settlement proceeds of the subject matter of the two engagement letters. In that count, respondent was found culpable of violating rule 4-100(A)(2), requiring an attorney not to withdraw trust funds for the attorney's use where the client disputes the attorney's right to take funds.

In count two the hearing judge determined that there was not clear and convincing evidence that respondent violated rule 4-100(B)(4) (requiring, on request, the prompt payment of monies the client is entitled to receive), section 6068, subdivision (c) (maintain only just actions), section 6068,

---

[3] References to former rules refer to these former rules. References to rules refer to the current Rules of Professional Conduct effective May 27, 1989.

subdivision (g) (prohibiting an attorney from commencing or continuing a proceeding from corrupt motive), or section 6106 (prohibiting acts of moral turpitude, dishonesty).

In count three it was alleged that respondent's response to the State Bar's initial investigative inquiries in connection with count two was made with an intent to deceive, in violation of section 6106. The hearing judge found that there was a lack of clear and convincing evidence of such a violation.

Respondent has filed a 95-page opening brief, accompanied by an appendix containing 525 pages, which appear to be an amalgam of transcripts and documents filed in State Bar Court proceeding number 96-TE-04697, portions of transcripts, declarations, periodical articles and other material, some from the matter before us and some from the superior court action by TDIC. We rely solely on the record including the transcript of the proceedings in the hearing department in this proceeding in considering this review. We note that State Bar case number 96-TE-04697 is not before us, nor are the superior court proceedings, except as to those portions that were received into evidence in this proceeding by the hearing judge.

Respondent seeks review of all findings of culpability, but his briefs address the finding of culpability and discipline on count one almost exclusively. On the other hand, the State Bar seeks review of counts two and three, asserting that respondent violated rule 4-100(B)(4) and section 6106 by delaying six weeks in providing his client with her share of settlement proceeds. The State-Bar also seeks review of the determination that clear and convincing evidence of respondent's misrepresentations to the State Bar investigator in violation of section 6106 was lacking.

Following our independent review of the record, we affirm the hearing judge's determination as to culpability on count one. In count two we ma};e a finding under our duty of de novo review of a violation of rule 4-100(B)(4), but otherwise affirm the hearing judge's findings as to that count. We also affirm the findings as to count three and affirm the hearing judge's recommendation that respondent be disbarred.

II. CONTENTIONS OF PARTIES

Although presented in a multitude of forms in his briefs,

the primary issue raised by respondent in count one is the propriety of the preclusive effect given by the hearing judge to the superior court action by TDIC against respondent. Respondent further argues that: (1) the hearing judge was biased against him; (2) the charge against him under former rule 2-107 is unconstitutionally vague; (3) the hearing judge's limitation on his time to present a portion of his mitigation evidence relating to work done for TDIC after they terminated his right to compensation as Cumis counsel unduly restricted his right to present a defense to Count One; (4) the charges are barred by the statute of limitations; and (S) the State Bar used "secret" documents against him.

The State Bar supports the factual findings and conclusions of the hearing judge as to count one, but argues that there is clear and convincing evidence of a violation of rule 4-100(3)(4) and section 6106 in count two, and that respondent's misrepresentations to the State Bar investigator constitute an additional violation of section 6106 in count three.

We first consider the propriety in count one of giving preclusive effect to TDIC's superior court action against

respondent, and then deal with the balance of the arguments asserted.

III. DISCUSSION

A. Count one -- Alleged False Billing

Respondent is charged with presenting false and misleading billing statements to TDIC between the period of March 1987 and May 1988. Commencing in November 1985, respondent was associated as Cumis counsel in some 41 malpractice actions against 4 dentists insured by TDIC. There was no written fee agreement between TDIC and respondent, but there was an oral agreement that respondent would be paid at a rate of $150 an hour for services rendered to the insured dentists.

For services purportedly rendered between March 1987 and the end of that year respondent was paid by TDIC the total sum of $357,024.86. The majority of these charges were billed at the rate of $150 an hour, a orally agreed, while a portion were billed at $175 an hour without either notice to TDIC or its agreement.

Respondent regularly billed TDIC for work before it was performed without either disclosing that fact to TDIC or obtaining its agreement. These bills, rendered monthly and separately on each of the 41 cases, reflected by date various services purportedly rendered, a description of the purported services, the time purportedly devoted to that service together with a total number of hours, multiplied by an hourly rate. The bills clearly represented that the indicated work had been performed. Respondent's bills were replete with descriptions such as "receipt of pleading," "records review," and "case preparation."

The record showed that on a large number of days respondent represented on bills that he personally worked in excess of 24 hours and that on a substantial number of days respondent represented he had personally worked in excess of 100 hours. This information was not discovered by TDIC until it did a complete audit of respondent's bills in 1988. Respondent identified his billing method as "bulk billing." Such a billing method was never agreed to by nor discussed with TDIC.

Respondent produced no time records, testifying that they had been destroyed within 90 to 180 days following each billing because TDIC had not complained. Respondent did not prepare pleadings in the malpractice cases other than one or two statements for settlement conferences. He prepared no memoranda, deposition summaries. written opinions, or other evidence reflecting productive work of the files in question. Respondent's files on these matters were disorganized and contained little in the way of evidence of client conferences. Respondent testified that he had an employee in his office count the number of pages of documents received pertaining to the TDIC matters and multiply that number by three minutes a page to determine his hours for billing purposes.

It was clear that many of the documents received were identical for each of the 41 cases, with the exception of the caption. Even so, they were each included in the scheme for determining time.

Upon the adoption of Civil Code section 2860, effective January 1, 1988, which section effectively amended the requirement that insurance companies provide Cumis counsel,

TDIC determined that it was no longer obligated to pay for or provide Cumis counsel to its insured dentists whom respondent was representing. After January 1, 1988, TDIC continued to receive bills from respondent, claiming that additional work had been performed prior to that date. By May 1988 TDIC stopped payment on those bills and following investigation determined that they had overpaid respondent some $250,000 based on bills representing work that had falsely been claimed to have been performed.

As indicated above, the bills were separately rendered monthly on the 41 separate files, and the fraudulent billing was not discovered until an audit of all of respondent's bills was completed.

These charges ultimately resulted in TDIC's successful action in the San Francisco Superior Court. That action included charges of fraud and deceit. In the superior court action, respondent cross-complained for the bills TDIC refused to pay and for other work allegedly performed after January 1, 1988. totaling $162,000. As to some issues raised by respondent's cross-complaint, the court granted TDIC's motion

for summary judgment. As indicated above, the jury returned a verdict against respondent on TDIC's claim in the sum of $286,024.86 and against respondent on the remaining issues in his cross-complaint.

In response to special interrogatories, the jury found, by clear and convincing evidence, that respondent acted with oppression, malice and fraud.

In an unpublished opinion, the First Appellate District Court of Appeal affirmed the judgment entered on the jury verdict in the superior court, as well as the order granting TDIC's motion for summary judgment. There, as here, respondent argued that he was entitled to be compensated for his work as Cumis counsel after the effective date of Civil Code section 2860. The appellate court affirmed the superior court determination that respondent was not entitled to such compensation from TDIC. The California Supreme Court and the United States Supreme Court denied review.

1. There was no error in giving the superior court judgment preclusive effect

In the superior court action, following a 12-day trial, the jury determined by clear and convincing evidence respondent was guilty of oppression, malice and fraud in his billings to TDIC for the period of March 1987 through May 17, 1988. In the disciplinary proceeding before us, respondent was charged with providing false and misleading billing statements to TDIC by representing work to have been personally performed that was not, in fact, performed, all covering the identical time period. In the superior court action, TDIC's claims manager testified that, following a full audit, he concluded that respondent had defrauded his employer through false billings by about $250,000.

As noted in the appellate court decision: "Litigation management expert, M. Brand Cooper, testified as to how attorneys generally keep track of time spent and bill their clients. At TDIC's request, Cooper had reviewed Berg's billings in this case. After describing that process and the reports it generated, Cooper testified that in his opinion Berg's billings

were 'unreasonable, excessive, dishonest and don't bear any relationship to the work that was actually expended. . . .' For reasons which he described in detail, he concluded that 'the overwhelming majority of the descriptions on the bills represent descriptions of work that was not performed.' Finally, he testified that appropriate compensation for the work Berg did as Cumis counsel was between $10,000 and $50,000."

Respondent urges error in the hearing judge denying him the right to re-litigate the propriety of his billing. We disagree. This court, in In the Matter of Applicant A (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 318, 327-329, extensively analyzed the applicability of collateral estoppel, relying partially on Stolz v. Bank of America (1993) 15 Cal.App.4th 217, at 222, and concluded that in the appropriate case that doctrine is applicable to State Bar Court proceedings.

Under that analysis the initial inquiry in the issue preclusion known as collateral estoppel is whether or not the issues on which preclusion are sought were, in fact, litigated in the prior action.

The transcript in the prior action was introduced into

evidence in the State Bar Court proceedings, along with the verdict, evidence of the jury determination of oppression, malice and fraud, and the unpublished appellate court decision. Both our review of the record in the prior action and the appellate court opinion confirm that the issue of the false billing was fully litigated in the superior court action.

Respondent takes a contrary view. He argues his evidence in mitigation changes the issues before this court, claiming, among other things, that he later performed the work for which he billed. He points out that in the civil proceedings he was prohibited from presenting that evidence. Such an argument misses the point. The issue in both trials was the propriety of the billing. The fact, if true, that respondent harbored some intention to later perform the work that he represented in bills as having been completed has no bearing on culpability based on a charge of false billing under either section 6106 or former rule 2-107. The issues are identical to those before the jury on a question of fraudulent billing.

The fact that additional evidence may be admitted in the State Bar Court proceedings on the issue of discipline (i.e.,

evidence in mitigation and aggravation) has no effect on the issues before either the hearing judge or this court on the question of respondent's culpability on count one.

The second issue to consider in collateral estoppel is whether or not the civil determination was made under the same standard of proof as required in disciplinary matters before the State Bar Court or the California Supreme Court. (In the Matter of Applicant A, supra, 3 State Bar Ct. Rptr. at p. 329.) Rule 213, Rules of Procedure of the State Bar, title II, State Bar Court proceedings requires that the State Bar prove culpability in disciplinary matters "by clear and convincing evidence." In the San Francisco Superior Court action the jury determined "by clear and convincing evidence" that with regard to the facts of the case respondent acted with oppression, malice and fraud. There can be no question that the standards of proof in the two matters were identical.

The remaining issues in the determination of applicability of collateral estoppel in bar court proceedings are whether: (1) the party before this court was a party to the civil proceedings; (2) there was a final judgment on the merits in the

civil proceeding; and (3) it would be unfair to precluding re-litigation of the issue or issues in question. (In the Matter of Applicant A, supra, 3 Cal. State Bar Ct. Rptr. at p. 329.)

It is clear that the defendant in the superior court action is the respondent now before us and that there was a final judgment in the prior action. On the third point, respondent asserts with great vigor that there is unfairness in prohibiting re-litigation of the propriety of his billing because the proceedings in the San Francisco Superior Court were unfair, primarily for the reason that he was not permitted to show work he performed after he was notified that he would no longer be paid by TDIC, and that the superior courts' application of Civil Code section 2860 was unconstitutional. He further argues that the appellate court was incorrect in the analysis of the issues. In referring to that argument, the hearing judge put it: 'Tm not going to rule on whether you had a fair trial. I think the Court of Appeal did that." We agree and decline to deal with an issue that has been resolved before a California Court of Appeal and that the California Supreme Court and the United States Supreme Court have declined to review. However, we do note

that from a review of the entire record there is no unfairness by the State Bar Court in refusing respondent the right to re-litigate the propriety of his billing to TDIC.

In summary, we affirm the hearing judge's exercise of discretion in applying the issue preclusion in the matter before us.[4] We note that the United States Supreme Court has approved the exercise of discretion by the trial judge in such a situation. (Parklane Hosiery Co. Inc. v. Shore (1979) 439 U.S. 322, 331.)

2. Former rule 2-107 Was Not Unconstitutionally Vague

In his opening brief in a section entitled "vagueness," respondent cites cases raising the issue of lack of notice to one charged with disciplinable professional misconduct. He then

---

[4] Although we hold that collateral estoppel was properly applied to preclude respondent from re-litigating the jury's finding that respondent's billing practices involved oppression, malice and fraud with respect to TDIC, we have independently determined that his fraudulent billing scheme is disciplinable under California law and the appropriate discipline to recommend as a result. The ultimate question in this proceeding is whether respondent should be disciplined, and if so, what the discipline should be. These are questions unique to the attorney discipline system; and are questions not determined by the application

appears to argue that former rule 2-107 fails to set forth standards for advanced billing. We agree that disciplinary rules must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." (Grayned v. City of Rockford (1972) 408 U.S. 104, 108.) However, such standards are explicitly set forth in former rule 2-107(B).

Although not clear, respondent appears to argue that he was doing "advance billing" with the intention of later performing the work and that former rule 2-107 does not specifically proscribe such "advance billings." Such a position must fail for the obvious reason that there was a clear representation in each bill sent to TDIC by respondent that the work had, in fact, been performed. Thus, bills were false on their face. Had TDIC agreed to "advanced billing" then the issue could be considered. No such evidence appears in the record. A witness for TDIC did testify, by way of example, that if .03 hours work billed on September 3 was, in fact, done on September 7, it would make no difference stating, "If he did the work he is entitled to payment." Such a statement is a far cry

---

of collateral estoppel.

from approving payment of over $250,000 worth of work that had not been performed at the time of the billing when the bills represented that the work had been performed.

3. The Relationship Between Respondent and TDIC is Governed by Former Rule 2-107

Respondent argues that, since the dentists and not TDIC were his clients, he did not owe a high duty of loyalty to TDIC as suggested in the hearing judge's decision. We need not reach the issue of a formal description of the relationship between respondent and TDIC. It is enough to say that he owed the duty of honesty and integrity that lawyers owe to all persons. (Cf. Stanley v. State Bar (1990) 50 Cal.3d 555, 567; see also Rules Proc. of State Bar, title IV, Stds. for Atty. Sanctions for Prof. Misconduct. (standards), Std. 2.3.) In addition, TDIC, the insurance company for the dentists, stood in the shoes of the dentists. The obligation of TDIC to pay respondent arose out of their policies of insurance covering the dentists. The attorney-client relationship was with the dentists, not the insurance company, but the insurance company was obligated to pay no more than was reasonable

for the services rendered to the clients. Absent insurance, the client would have been obligated to pay for the services. To argue that an attorney does not owe the same duty regarding billing to a third person who has agreed to pay the reasonable attorney fees for the client as would be owed to the client, is to create a distinction without a difference. (Cf. Id.)

Former rule 2-107(A) stated: "A member of the State Bar shall not enter into an agreement for, charge or collect an illegal or unconscionable fee." That proscription is not limited to charges to the client, although obviously that would be the most common application. The term "client" is used only in setting forth some of the factors to be used in determining the reasonableness of the fees in former rule 2-107 (B). We determine that the proscriptions of former rule 2-107 apply with equal force to those cases, such as the present case, where a third party has assumed the obligation to pay the attorney's fees. However, we voice no opinion on the applicability of former rule 2-107 where a court awards fees according to agreement or statute to the prevailing party in litigation.

4. Respondent was not unduly restricted in presenting mitigation evidence

Respondent argues that he was prejudiced by the hearing judge limiting his time to present evidence in mitigation of the work that he performed after being notified by TDIC that they would no longer pay for his services allegedly rendered after January 1, 1988. We note that the court invited respondent to present in summary form the work he allegedly performed for which he was not paid. This resulted in exhibit N, a 26-page document that presents in summary form the work allegedly performed by respondent after January 1, 1988. The court received it in evidence even though the first 14 pages of that exhibit covered a period prior to the end of 1987. As counsel for respondent indicated, respondent was prepared to go forward with documents supporting each entry in exhibit N, but indicated that "going through all of the items which are summarized here in Exhibit N would probably take us a couple of weeks." Exhibit N was accepted into evidence and respondent was permitted, over the objection of the State Bar, to enter into a narrative covering some 30 pages of transcript on

that exhibit.

Respondent fails to accept that the evidence was admitted solely for purposes of mitigation, and continues to argue that the evidence goes to culpability. As we have discussed ante, we hold otherwise.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time . . . ." (See also 1 Witkin, Cal. Evidence (3d ed. 1986) Circumstantial Evidence, § 298, pp. 268-270.) The sole purpose for considering the evidence in question was to show mitigation. The essence of the material was clearly set forth in the exhibit received in evidence covering the efforts respondent put forth after his compensation had been terminated. We further note that the mitigating effect of those efforts is lessened by respondent's testimony that when he performed those services he expected to be compensated for them. We find a commendable exercise of discretion by the hearing judge.

5. The charges are not time barred

Respondent argues that an action based on fraud is barred unless proceedings are commenced within three years of discovery, citing Code of Civil Procedure section 338, subdivision (d). At the time this matter arose, the rules concerning disciplinary matters had no limitation period. (See Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 51(h) [new rule on limitations effective only on complaints and reports received by the State Bar after July 1, 1995].) Therefore, the mere lapse of time in the filing of a disciplinary complaint is no defense absent a showing of specific prejudice. (Yokozeki v. State Bar (1974) 11 Cal.3d 436, 449.) No such showing has been made.

6. The state Bar did not use "secret papers" against respondent

Respondent argues that he was refused access to the briefs filed by the parties in In the Matter of Applicant A, supra, 3 Cal. State Bar Ct. Rptr. 318. That was a moral character proceeding, which are confidential and not public under section 6060.2. As recited in that opinion, the applicant

waived confidentiality only as to the decision that was published. Respondent asserts that the State Bar had access to these briefs, and that he was denied such access. While such an assertion is not supported by the record, assuming it to be true, it entitles respondent to no relief. The situation is no different than any prosecuting agency or private law office that may have internally available prior research on an issue addressed in a published opinion similar to that at hand. Respondent cites us to no authority suggesting that the "use," if any, of such material is improper. The argument is devoid of merit.

B. Count Two – Handling of the Proceeds of the Reynolds Settlement

Reynolds engaged respondent to represent her in two separate automobile accident cases involving personal injury to Reynolds. In the earlier case, an engagement letter dated September 7, 1989, provided that the attorney's fees would be one-third of the recovery if the case settled before a trial setting conference and forty percent if it settled thereafter. In the later case, an engagement letter effective January 12, 1990, stated that the fees would be forty percent of the net recovery. Since

the defendants in the two cases were insured by the same insurance carrier, the cases were consolidated.

The two cases were arbitrated and no trial-setting conference was held, resulting of an award of $18,500. Thereafter, respondent was able to negotiate a settlement in the total sum of $27,500, which was not allocated between the two cases. Respondent calculated his fee at forty percent of the total recovery, amounting to $10,571.24 and set that forth on a settlement statement. Reynolds signed that statement containing the forty percent allocation to attorney's fees on June 25, 1991. However, on June 26 she wrote respondent objecting to his taking forty percent on both matters when the earlier agreement called for but one-third. That letter was received in respondent's office on June 28.

On June 28, 1991, respondent issued to himself a check drawn on his client trust account in the sum of $3,571.24, and on July 10, 1991, he issued a second check on the same account to himself for what he claimed as the balance of his fees in the sum of $7,000, which represented a total of forty percent of the $27,500 recovery. Respondent testified that he was unaware of

Reynolds's letter of June 26 and first became aware of a fee dispute as the result of a letter from Reynolds dated July 23, 1991. In the July 23 letter Reynolds reiterated her position and demanded payment of her portion of the proceeds.

Following receipt of the July 23 letter, respondent sent a revised settlement statement suggesting that Reynolds sign it under protest, that respondent would deliver the uncontested portion to Reynolds, and that "we can work on resolving the disputed portion." Although it was mentioned in the engagement letters, respondent did not suggest that the fee dispute be arbitrated by the local bar association. (See, generally, § 6200 [arbitration of attorney's fees].) On August 2 Reynolds signed the revised statement reiterating her position. On August 6, respondent sent to Reynolds the undisputed portion of $15,274.37.

Three days later Reynolds filed a small claims action against respondent for the disputed amount of fees, and respondent countered with a municipal court complaint alleging that her failure to cooperate as a client had cost him a much larger fee. Following a judgment in favor of Reynolds,

respondent filed a notice of appeal, but the appeal was dismissed when respondent failed to deposit fees. That judgment was satisfied.

1. The payment of fees to respondent and proceeds to Reynolds

The hearing judge determined that respondent was culpable of a violation of rule 4-100(A)(2), requiring that when an attorney's right to a portion of trust funds is disputed by a client, the dispute must be resolved before the disputed portion may be withdrawn by the attorney. On the other hand, the hearing judge determined an absence of clear and convincing evidence that respondent violated rule 4-100(B)(4), requiring, on request, prompt payment by an attorney of monies the client is entitled to receive or that he violated § 6106 (proscribing acts involving moral turpitude, dishonesty).

Reynolds's letter of June 26, 1991, was admittedly received by respondent's office on June 28. In that letter Reynolds disputed respondent's right to the total fees he claimed and further stated that she expected a check for the full amount she claimed due her. Respondent testified that he

did not see that letter and was not aware of its contents until long after he took his fees.

As the hearing judge points out, even if this is true, respondent failed to provide any evidence of a return to trust of the disputed portion of the fees, even after admittedly being put on notice of the dispute. We agree with the hearing judge's determination that respondent is culpable of violating rule 4100(A)(2), because he did not return the disputed portion to his client trust account pending the dispute's resolution, (In the Matter of Fonte (Review Dept. 1994) 2 Cal. State Bar Ct. Rptr. 752, 758) and in taking disputed fees out of trust.

The charge of violation of rule 4-100(B)(4) presents a more involved question. It is fundamental that respondent had no more right to his fees than did the client to her share of the settlement proceeds. The question is whether we charge respondent with knowledge of Reynolds's June 26, 1991, letter that was in his office at the time of his withdrawal of the balance of his claimed fees.

In the normal course of the operation of a law office an attorney should not be at risk of discipline for the failure to

have knowledge of every item of information that comes to the office. (Palomo v. State Bar (1984) 36 Cal.3d 785, 795-796; In the Matter of Respondent E (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 716, 726.) Here, however, the attorney took action regarding trust funds in which a client had an ownership interest, to the detriment of the client and to his advantage, without considering the information that the client had, in fact, provided him. There is no explanation in the record for respondent taking a portion of the settlement proceeds without simultaneously providing to the client her portion of those proceeds. There is nothing that suggests that respondent was entitled to some priority in the disbursement of the settlement proceeds of client's matters.

We agree with the hearing judge that a six week delay in the disbursement of proceeds of a settlement would not, per se, result in a violation of rule 4-100(B)(4). However, when an attorney disburses his or her portion of client's settlement proceeds for the account of the attorney and thereafter delays in disbursing the client's portion of such proceeds for a material period of time without compelling reason, serious concerns as

to whether such a violation has occurred are raised.

Respondent was working with the subject matter of the June 26 letter from the client; it was a matter in which he owed the highest duty to the client to act fairly, and he was obligated to review the file and other information sent him by the client, including her demand for payment. Under the circumstances of this case, we do charge respondent with the knowledge of the information the client had provided to him.

In the face of that demand, combined with the fact that respondent made disbursements to himself, and absent good reason for holding the funds, we conclude contrary to the hearing judge that respondent's failure to make disbursement to the client for a period of six weeks constitutes a willful violation of rule 4100(B)(4). However, like the hearing judge, we do not conclude that respondent's failure involved moral turpitude in violation of section 6106.

2. The filing of a civil action against Reynolds

In count two respondent is also charged with violation of section 6068, subdivision (c) requiring an attorney to maintain only such actions as appear just. In addition, he is

charged with commencing or continuing an action from corrupt motive of passion or interest in violation of section 6068, subdivision (g). The object of these charges is the municipal court action respondent filed against Reynolds in response to her small claims filing.

We agree with the hearing judge that there is no clear and convincing evidence of the motivation behind respondent's actions in filing such a response to the small claims action. However, respondent's conduct does raise questions about his motivation. He did not suggest that the dispute could be resolved through arbitration with the local bar association, even though it was in the fee agreements In addition, the dispute was clearly within the jurisdiction of the small claims court. However, as indicated by the trial court, respondent's conduct was within his legal rights. We conclude there is an absence of clear and convincing evidence that respondent acted from a corrupt motive in violation of section 6068, subdivision (g). Likewise, we conclude that there is no clear and convincing evidence that the action was unjust in violation of section 6068, subdivision (c).

C. Count Three -- Respondents representations to the State Bar regarding the Reynolds charges

In September 1992, a State Bar investigator wrote respondent inquiring about the Reynolds matter. On October 2, 1992, respondent wrote, replying that Reynolds objected to the fee for the first time on August 2, 1992, and that when he withdrew his fees there was no fee dispute. The State Bar alleges these statements were false and made with the intent to deceive, involve moral turpitude, and, therefore, violate section 6106.

The hearing judge points out that it is plausible that in his October letter to the State Bar respondent may have confused the time he received information that Reynolds disputed the fee. Even though controverted, respondent's version supports a reasonable inference of absence of misconduct, which the hearing judge was free to find. (See, generally, Davidson v. State Bar (1976) 17 Cal.3d 570, 573-574.) Even though we have charged respondent with knowledge of Reynolds's June 26 demand for payment for purposes of rule 4-100(B)(4), we do not attribute that knowledge to him for

moral turpitude purposes under section 6106. Resolving reasonable doubt in favor of respondent (Vaughn v. State Bar (1972) 6 Cal.3d 847, 852), we agree that the State Bar has not shown a violation of section 6106 by clear and convincing evidence.

D. Alleged Bias By the Hearing Judge

With respect to his contentions regarding bias of the hearing judge, we note initially that respondent has failed or refused to support them with cites to the transcript by page and line, nor has he identified any exhibits by the number or letter of the exhibit and page of the exhibit, but only by reference to the massive appendix he has prepared. As we noted earlier, that appendix contains reference to material that is not properly before us. As a consequence, respondent has failed to comply with rule 302 (a) of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings and waived any error. (Cf . rule 15 (a), Cal. Rules of Court; 9 Witkin, Cal. Procedure, (3d. ed. 1985) Appeal, § 475, pp. 467-468.) Nonetheless, we have exercised our discretion and searched and located the relevant portions of the record in the

furtherance of justice.

Respondent takes exception to the hearing judge's observation in the decision that, when respondent was asked about his state of mind and the nature and quantity of the work he actually performed he rambled, related anecdotes, and gave details of underlying malpractice cases. We have reviewed the record and confirmed that respondent repeatedly used a question as a platform to initiate a description of material that may or may not have been related to the question asked and regularly exceeded the bounds of the question without fully answering it. In spite of repeated reminders by both the court and his own counsel, this conduct continued throughout the trial. The identical conduct was noted by the appellate court in the civil trial. Even the examples cited by respondent as providing direct responses to questions from the court show that respondent exceeded the bounds of the questions in giving his answers.

A reading of the record demonstrates that the hearing judge took an evenhanded approach to attempting to obtain from a difficult witness the information essential to reaching a

just decision in this matter. The record reflects an unfortunate determination on the part of respondent to describe events in his own way, regardless of the specific questions put to him. We find no indication of bias on the part of the hearing judge. In fact, we laud the hearing judge's effort to set forth the factors he relied on in making his credibility determinations. (See In the Matter of Wright (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 227 [court should declare how it weighed the evidence and determined the credibility of the parties and witnesses]; see also Evid. Code, § 780, subd. (c) [in making credibility determinations, finder of fact may consider the extent of the witness's capacity to perceive, recollect, and communicate the matter about which he testifies].)

IV. DISCIPLINE

A. Mitigating Circumstances

We have reviewed the hearing judge's determinations of mitigation and agree. Respondent testified that he did some pro bono immigration cases in the 1960's, that he was a trustee at his temple and assisted in the acquisition of land for the

temple in the 1970's, and that he did some pro bono work for a doctor and a professor and for the Union of Physicians by preparing its bylaws in the 1980's. In 1989 he suffered a heart attack that severely limited his activities for a period of approximately six months. In the 1990's he worked on a social security case and an unemployment case, as well as writing an amicus brief for the Union of Physician and served as a consultant to the Union of Physicians, all pro bono. We give minimal mitigating credit to such pro bono work.

Respondent sought to show, by way of mitigation, that he devoted an enormous amount of time to TDIC matter for which he was not paid and urged that as mitigation. However, respondent admits that he expected to be paid for those hours even though TDIC initially refused to do so. In addition, respondent produced no billings, time records or work-product that substantiates his claim. Respondent sought compensation for that time in his cross-complaint against TDIC in the superior court. That claim was denied. There is no clear and convincing evidence that the work was ever performed, and if performed, it was in the expectation of being compensated.

Thus, we find no basis for mitigation in the scenario recited concerning the alleged work for which respondent sought compensation from TDIC.

In summary, there is no showing by clear and convincing evidence that demonstrates that the public, courts, and legal profession would be adequately protected by reduced discipline, pursuant to standard 1.2(e).

B. Aggravating Circumstances

Respondent has a prior record of discipline. On January 24, L986, respondent was privately reproved for one count of client abandonment that occurred over the period from 1981 through 1983. Standard 1.2(b)(i) suggests that a prior record of discipline demonstrates a need for a greater degree of disciple than otherwise might be warranted.

There were multiple fraudulent monthly bills in the TDIC matter, each representing one of the 41 cases on which respondent was Cumis counsel. Respondent was found to have billed throughout 1987 and well into 1988 for services that had not, in fact, been performed. The fraudulent bills stopped only when TDIC commenced its audit of respondent's charges and

refused further payment. Standard 1.2(b)(ii) indicates that multiple acts or a pattern of misconduct is an aggravating circumstance.

We determine that the multiple fraudulent billings, representing numerous monthly bills, covering a continuous period of in excess of 10 months, constitutes a pattern of misconduct.

As the hearing judge noted: "Respondent's unconscionable fees and deliberate misrepresentations to TDIC over an extended period of time clearly established his culpability of multiple instances of serious misconduct, all of which involved moral turpitude. 'Such dishonest conduct is inimical to both the high ethical standards of honesty and integrity required of member of the legal profession and to promoting confidence in the trustworthiness of members of the profession.' (Stanley v. State Bar, supra, 50 Cal.3d 555, 567.)"

Throughout the proceedings in the superior court, Court of Appeals, and even through argument to this court, respondent has refused to acknowledge any misconduct in his billing. It has been determined that he repeatedly fraudulently

billed TDIC. That determination has been affirmed on appeal, and respondent's basic response is that the decision is in error. In spite of the finality of that determination, respondent devotes some 80 pages of his brief in arguments that miss the point of the fact that a final determination has been made of his fraudulent misconduct. As did the hearing judge, we quote from In re Morse (1995) 11 Cal.4th 184, 209: "Of course, [respondent], like any attorney accused of misconduct, had the right to defend himself vigorously. [Respondent's] conduct, however, reflects a seeming unwillingness even to consider the appropriateness of his statutory interpretation or to acknowledge that at some point his position was meritless or even wrong to any extent. Put simply, [respondent] went beyond tenacity to truculence."

Put another way, respondent's "defense did not rest on a good faith belief that the charges were unfounded, but on a blanket refusal to acknowledge the wrongfulness of conceded conduct (citation.)" (Carter v. State Bar (1988) 44 Cal.3d 1091, 1101.) This applies to both the TDIC matter, which we have determined involves moral turpitude, and the trust account

violations concerning his client Reynolds. Respondent's lack of insight into the wrongfulness of his actions is an aggravating factor. (Id. at pp. 1100-1101.)

C. Appropriate Level of Discipline

We look for like cases to assist in the determination of the appropriate discipline. In Cannon v. State Bar (1990) 51 Cal.3d 1103, the Supreme Court determined that there was an absence of a pattern of willful failure to perform services, but concluded that disbarment was appropriate because of the existence of multiple instances of serious misconduct.

In Dixon v. State Bar (1985) 39 Cal.3d 335, respondent was culpable of moral turpitude, attempting to charge an unconscionable fee, failing to maintain a record of client funds and account for them, and failing to refund fees paid in advance and not expended on the client's behalf. There the court pointed out: "Moreover, as in the previous proceedings, petitioner has been firm in his refusal to admit wrongdoing or to show remorse. He continues to assert, albeit based on shifting descriptions of the facts, that his conduct was appropriate and he owes no refund to his clients." (Id. at pp. 343-344.) Dixon

had a prior suspension and was disbarred.

In the instant case, respondent has shown no remorse and has continuously asserted the propriety of his conduct even though it has been determined to have been fraudulent. This denotes an unwillingness to accept the judicial process, even aside from the disciplinary process. It suggests that, for respondent, the sole interpretation of the Rules of Professional Conduct and the State Bar Act is his own.

We take the repeated fraudulent billing, involving moral turpitude, to be a matter from which the public deserves substantial protection. When this misconduct is combined with the misconduct found in the Reynolds matter, consisting of not promptly paying over proceeds to a client and not retaining disputed fees in a trust account, and respondent's inability or unwillingness to accept the judicial process, it places the public, the courts, and the profession at risk. In the judgment of this court, nothing less than disbarment will appropriately control this risk.

V. ORDER

Respondent has been involuntarily enrolled as an

inactive member of the State Bar under section 6007 subdivision (C)(4) in State Bar Court proceeding 96-TE-04697 and will remain so absent further order. Nonetheless, we consider the application of section 6007, subdivision (C)(4) (as amended effective January 1, 1997) mandatory. We order that respondent be involuntarily enrolled as an inactive member of the State Bar in accordance with section 6007, subdivision (c)(4), effective 15 days after service by mail of this order on respondent.

V. RECOMMENDATION

We recommend that respondent be disbarred. We further recommend that respondent be ordered to comply with the requirements of rule 955 of the California Rules of court within 30 days after the effective date of the Supreme Court order in this matter and file the affidavit provided for in paragraph (c) of that rule within 40 days after the effective date of the order, showing his compliance with that order.

In addition, we recommend that costs be awarded to the State Bar in accordance with section 6086.10 of the Business and Professions Code and that such costs be payable

in accordance with Business and Professions Code section 6140.7 (as amended effective January 1, 1997.)

Obrien, P.J.

We concur:

Norian, J.

Stovitz, J.

Appendix C

ORDER

IN RE MASON HARRY ROSE V

ON DISCIPLINE

No. S062859

California Supreme Court

Filed December 10, 1997

The State Bar of California is ordered to cause why the Supreme Court should not issue a writ of review and accord this proceeding plenary consideration notwithstanding its determination that no issue raised warrants consideration under California Rules of Court, Rule 954(a). The return to the order to show cause shall be served and filed by January 9, 1998. Briefing should address both whether there is a constitutional requirement for plenary consideration and the criteria the court may use in determining whether plenary review should be accorded.

George, Chief Justice
Mosk, Associate Justice
Kennard, Associate Justice
Chin, Associate Justice
Brown, Associate Justice

Appendix D

STATE BAR COURT

STATE BAR OF CALIFORNIA

HEARING DEPARTMENT - SAN FRANCISCO

In re the Matter of	Case No. 92-0-11504 EEB
JEROME BERG, No. 28842	CORRECTED ORDER
A Member of the State Bar.	SUMMARIZING STATUS
_____/	CONFERENCE

A status conference was conducted on May 19, 1995, to define and narrow the issues presented in this case as part of an effort to narrow the discovery that will be conducted. Attending the status conference were Deputy Trial Counsel Andrea Wachter, Respondent's counsel, Robert Rudolph, and Respondent.

As a result of the status conference, I have determined that it is and will be undisputed that Respondent utilized a "bulk billing" system under which he determined the fees he charged to TDIC by using a formula that calculated the fees based on the quantity of pleadings and documents he received.

This resulted in TDIC being billed for services which were not performed at the time of the billing. The State Bar alleges that this billing system resulted in misleading bills to TDIC and caused TDIC to pay unconscionable fees to Respondent.

Additionally, it is undisputed that in January 1988, TDIC notified Respondent that pursuant to Civil Code section 2860, TDIC would no longer pay for Respondent's services. Respondent contends that he continued rendering legal services to the dentists insured by TDIC whom he had been hired to represent. The state Bar disputes this contention.

As a result of the discussions at the status conference, I see the following legal and factual issues in this case:

> Was TDIC aware of Respondent's "bulk" billing method? Did TDIC agree to this method of billing? Were the fees charged using this "bulk" billing method unconscionable when they were billed?
> If at some point in time, Respondent did perform all the hours of work he billed for using his "bulk" billing method, was the fee unconscionable?
> Since Respondent's clients were not TDIC, but rather the dentists that TDIC insured, could TDIC terminate their financial responsibility for Respondent's fees after 1 January 1998 in light of TDIC's alleged obligation to provide independent counsel to the dentists.?
> If TDIC was not financially liable for Respondent's fees after January 1988, what was the extent of the services that Respondent rendered up to that point

in time?
How much work did Respondent perform on behalf of TDIC's insureds?

It was apparent from the discussion that the extent of the services Respondent provided to the dentists will be relevant in this proceeding, at least on the issue of mitigation. To try to reduce the amount of discovery that will be conducted and the amount of trial time needed, Respondent will prepare some draft factual background stipulations relating to the TDIC cases Respondent worked on and the extent of the work her performed. Respondent will submit those stipulations to the Deputy Trial Counsel who will review them with TDIC to see if she can agree to any of the stipulations. This must be completed prior to the next status conference.

The parties will submit simultaneous briefs on the issues of whether Respondent's billing practice which resulted in billing for work before it was performed constituted the charging of an unconscionable fee. Additionally, the parties will submit briefs on the issue of whether the fee is unconscionable if at a future date, the hours bill and paid for have been worked.

Their briefs must be filed by June 23, 1995. Simultaneous responses must be filed by July 7, 1995. An appearance status conference will be conducted on July 21, 1995, at 10:30 a.m. to discuss discovery issues.

Dated: May 25, 1995 /s/_____

Jennifer Gee

Judge of the State Bar Court

Appendix E

[Supreme Court filed May 10, 2000]

S064786

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

IN THE MATTER OF JEROME BERG ON DISCIPLINE

Petition for reconsideration denied. Brown, J., is of the opinion the petition should be granted.

/S/ Chief Justice George

Appendix F

---- Excerpts From Petition ----

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In Re the Matter of JEROME BERG

No. S064786

VERIFIED PETITION FOR RECONSIDERATION OF DISBARMENT WITHOUT PLENARY REVIEW

State Bar Court Case Nos:

92-0-11504 EEB,

92-0-014486 EEB

RECEIVED

March 24, 2000

CLERK OF SUPREME COURT

Robert Rudolph, Esq.

State Bar No. 142252

1255 Post Street, Suite 606

San Francisco, CA 94109

(415) 775-7751

at page 2 of the petition

II. PETITIONER'S MERITORIOUS CASE (AS DEFINED BY RULE 954 (A)) IS NOT DISPUTED BY THE STATE BAR OF CALIFORNIA

The Rule 954(a), Cal. Rules of Court merits of petitioner's case outline in his September 30, 1997 Petition for Review which documents that he was treated unfairly (Rule 954 (a)(3) below in the statutory State Bar Court when every applicable court rule, statute, and published precedent was twisted or ignored, and demonstrates that the decision is not supported by the weight of the evidence (per Rule 954 (a)(4) and that disbarment is excessive under the facts (per Rule 954(5)). In the pages which follow a few of the mos egregious of those due process irregularities in the State Bar Court system are presented in detail. The prior petitions in Mr. Berg's matters and his costs petition (S064786) present a wider picture of extensive error below. As to the 5 clear violations of fair proceedings articulated here (at ft. nt. 2 on page 5) the State Bar of California concedes the truth of petitioner's due process grievances concerning the proceedings in his matter in the State Bar Court in its August 26, 1999 letter brief answering petitioner's *amicus* brief in Paguirigan (*Supra.*). Obviously petitioner's Paguirigan *amicus* brief did not include all the abuses Mr. Berg suffered in the State Bar Court, but only addressed issues which will be relevant to further proceedings if Paguirigan is remanded.

at page 10 of the petition

7. In The State Bar Court The Judgment In The Civil Case Was Given Preclusive Effect

As I will demonstrate below (at IV pages 20-28 hereof) where the State Bar Court trial is discussed) rather than examine the due process defects of the civil case as required by Rest. Judgments, 2d §§ 27 and 29 and a published policy decision of the State Bar Court Review Department, the State Bar Court decided to forgo that inquiry and give that judgment (for fraud) preclusive effect despite its demonstrated unfairness based on uncontested declarations illustrated by exhibits filed in the State Bar Court long before trial there. In Section VI at page 20 I quote the State Bar judge's ruling that he will not conduct an unfairness review and cite where the State Bar Court Review Department agreed.

B. The Civil Court Judgment Was Not Entitled to Preclusive Effect Because The State Court Unfairly Prevented A Cohesive Defense

1. The underlying Civil Case, TDIC v Berg

a. The Claim; Elements Of A Fraud Case

The issues in the Superior Court case of TDIC v Berg are straight forward. TDIC contended in the civil suit that its experienced, bill-scrutinizing, sophisticated (Rule 4-200 (2)) claims professionals were bamboozled, and petitioner did no work, or little work for the $350,000 he received, although almost $180,000 was paid on the detailed itemized bills which at trial TDIC's expert did not criticize.

To prove a case of fraud under California law *each and every one* of the following elements must be established by clear and convincing evidence:

a. misrepresentation (false representation, concealment, or nondisclosure);

b. knowledge of falsity ("scienter");

c. Intent to defraud, i.e., to induce reliance;

d. Justifiable reliance; and

e. Resulting damages.

Witkin, Summary of California Law, 9th Ed., Torts §676.

b. The Defense

Defense to a fraud claim about a lawyer's bills requires proof on several points each of which supports and corroborates the others. Obviously, forbidding appropriate

defense evidence unfairly weakens the structure of the defense. These are the matters which petitioner was entitle by law to prove in his defense of a fraudulent legal billing claim:

1. Advance billing based on the volume of materials received by the lawyer is not forbidden. (See Baronowski (*supra*) and the SEC case, *supra*), and note this court uses that method to pay lawyers who prepare indigent capital defendants' criminal appeals.[7]

2. The total of petitioner's bills are reasonable, averaging about $8,500 of work for each of the 40 plus litigated cases which ran several years. By comparison the Dr. S case (which only ran a few months and was finished before the advance billing started) required legal fees of $10,839.50 based on itemized task-based charges (See Exhibit I). The advance bills from mid 1987 to the start of 1988 reflect work performed for about 6 months before enactment of Civil Code § 2860. The next two-and-a-half years of petitioner's work was forbidden as defense evidence in the TDIC civil fraud case (based on misinterpretation of § 2860 which is discussed hereafter at page 25 at paragraph 10).

3. Petitioner's work was needed because: a) there were conflicts between TDIC's selected lawyers and the dentists. Under their malpractice insurance the dentists were entitled to have TDIC pay for their independent counsel's services. (See Section C (1) & (2) above at page 5 & 6), b) petitioner

---

7 See footnote 6

performed the work and was active in all the litigated malpractice cases against his clients until they concluded 2 1/2 years after TDIC's "cut-off" letters, c) TDIC told their insureds after the "cut-off" letters to continue to consult petitioner if they felt there were problems, and d) petitioner created and managed an arbitration process in which TDIC participated to resolve over 300 unlitigated claims against his dentist clients after the "cut-off" letters. Petitioner designed and obtained agreement from all counsel that this arbitration and all the evidence therein would remain confidential so it could not be used as evidence to support punitive damages in the pending 40 negligence/intentional wrongdoing civil suits.

4. The nature of problems overcome by petitioner. (See Rule 4-2-- (3) & (5) and Civil Code § 1670.5(6).

5. The work was done by petitioner. Four types of evidence prove petitioner did all the work which he billed and more: a) many documents in evidence in both civil case and the State Bar case generated after the "cut-off" letters mention petitioner or are signed by petitioner, b) records, bills, and correspondence from TDIC's selected lawyers to TDIC mention petitioner's work throughout the litigation malpractice/intentional tort cases against the dentists to the end of those cases, c) the testimony of Dr. P's wofe/office manager in the TDIC civil trial describeds petitioner's intense work and request discussions of the cases with her and Dr P. (See Appendix H), d) finally petitioner testified without contradiction at the State Bar trial that he did thousands of

hours of work in the 2 1/2 years after the "cut-off" letters for which he was paid under the advance billing system. (State Bar Transcript II 55:3-13, 65:17-19, 66:6-8, 68:11-15, 69:13-22.) Note this is the only *element* which depends on petitioner's credibility. Edmondson v State Bar (1981) 29 Cal. 3d 339, 343 [172 Cal. Rptr. 899] holds the licensee's unrefuted testimony can not be "arbitrarily disregarded" in the State Bar hearings. An examination of the work reflected in $180,000 of itemized bills (in evidence in the civil case as well as the State Bar Court case) compared to the advance bills shows that denying petitioner the right to prove his two-and-a-half years of work after the effective date of the cut-off letters resulted in the unfair fraud verdict because a similar volume of work, or more, which is not itemized in the advance bills was obviously needed and performed as reflected in over 400 references to documents in evidence which petitioner presented in the 26 page single-space chronology which became Exhibit N in the State Bar Court trial, but which petitioner was forbidden to fully develop at the State Bar Court trial by a ruling limiting petitioner's time to present evidence on the 40 cases to a scant one hour (90 seconds per case), although an additional day and a half had been scheduled for his State Bar Court trial. See Section D (2) at page 22 hereof.

at page 17 of the petition

b. The Actual Average Fee

Dividing the $357,024.86 TDIC paid among the 42 dental malpractice/intentional tort cases yields $8,501 per case (actually less because the Dr. S case is not included in the count, because it ended before the advance billing, but the $10,000.00 Dr. S fee is included in the total fees received).

The California State Bar Court disbarment level case (Count One, the TDIC case) was not tried as a *per se* violation of billing standards or as a Rule 4-200 unconscionable fee case as charged. Pre-trial declarations and offers of proof established that neither issue could have been proved against petitioner, so instead, the State Bar Judge conducted count one as a fraud case, but no defense was allowed to the case-in-chief; instead, the unfair civil judgment of fraud was given preclusive effect without an unfairness analysis required by In the Matter of Applicant A (California State Bar Review Dept. 1995) 3 Cal. St. Bar Ct. Rptr 318, 322, 332. Lack of a trial in the State Bar Court didn't inhibit the State Bar judge from re-weighing controverted evidence from the civil trial and making new findings adverse to petitioner which the civil jury did not make.

The test of Hensley v Eckerhart 461 U.S. 424, 433 [103 S.Ct. 1933] (1983) used for Civil Rights Act legal fee awards is helpful to understand that an "unconscionable fee" case could not have been proved against petitioner if all the evidence was

considered. "The most useful starting point for determining the amount of a reasonable fee is the number of hours *reasonably* expended on the litigation multiplied by a *reasonable* hourly rate." (Emphasis added). Undocumented hours are included; "Where the documentation of hours is inadequate the district court *may* reduce the award accordingly." (*Id*..)

Whether or not a [a litigant] agreed to pay a fee and in what amount is not decisive [to determining a fee award]. . . . Such arrangements should not determine the preparation time must be accorded. The hours of work were obviously expended. And it must be noted that petitioner, his employee Steven M. Schram, Esq., and other associates employed by petitioner also participated. There is a record of the work being done, but no itemized billing for about half of it. Absence of documentation does not require disallowance of a legal fee. See Webber v Langholz (1995) 39 Cal.App. 4th 1587 [46 CAl.Rptr. 677, 683].

at page 18 of the petition

C. Rulings By The State Court Which Forbade An Integrated Defense

The state court forbade: a) any testimony of petitioner's work after TDIC's "cut-off letters, b) any description of the work done by petitioner, and c) any evidence the work was needed due to the conflicts-of-interest of the insurance company's selected lawyers. The state court also re-wrote Civil Code § 2860 to raise the level of proof of conflicts which gives rise to a right to "independent counsel" from the statute's actual language, "possible conflicts" to "direct evidence" of conflicts (at the foot of page 8 of the Court of Appeal decision in A057488). No published decision before or after expresses this judicial revision of the legislature's work, but in the State Bar Court, Rule 3-310 of the California Rules of Professional Conduct (formerly 5-102(B)) which also requires independent counsel in the event of "possible conflicts" was ignored by that court but only for the benefit of petitioner's case. In other cases Rule 3-310 is enforced against lawyers. (See the 1996 State Bar Court case of Heroico M. Aguiluz where a lawyer represented two parties in a fender bender case and was disciplined for being in a conflict of interests with his two accident-victim clients.) Petitioner's uncontested declaration which described the conflicts between TDIC's usually designated lawyers and petitioner's clients based on his knowledge of the cases (showing possible outcomes which forbid indemnification by an

insurance company described in ¶ 1 beginning at page 5 above) was held inadequate in the civil case because he illustrated his eyewitness statement analyzing the cases he was defending and the conflict with excerpts from exhibits which were not full copies of volumenous documents. Obviously, it no exhibits were submitted the evidence expressed in Mr. Berg's eyewitness declaration would not be subject to criticism.

Petitioner's work in the TDIC case was valuable.[10] California law as well as federal law on the subject of legal fees allows the lawyer to produce evidence of "the quality and necessity" of his work. (See Shaffer v Superior Court (1995) 33 Cal.App. 4th 993, 1002 [39 Cal.Rptr.2d 506, 512] and California Civil Code § 1670.5 (6) which allows "a reasonable opportunity to present evidence about the work, its commercial setting, purpose and effect.") This right to produce evidence was denied petitioner in the civil case. A dozen attempts to introduce such evidence were denied inwhole or in part (some without TDIC's objection) in a series of documented *ad hoc* rulings each of which was accompanied by an insulting about Mr. Berg to the jury by the civil court judge. This list uniformly evidences the judge's refusal to enforce Civil Code § 1670.5 (6).

As shown above petitioner was allowed by the State Bar Court judge a scant one hour (90 seconds per case) to give

---

10 Appendix H lists some petitioner's accomplishments in those cases which he tried to bring into evidence in the civil case and was frustrated by unfair *ad hoc* ruling of the civil court.

evidence of his work on those cases. But not in defense (where the Bar has a clear & convincing burden of proof per State Bar Court Rule of Procedure, Rule 213) but only for mitigation, and the burden of proof imposed on that point was against petitioner by "clear & convincing evidence" a standard never established by this court.

IV. IN THE CALIFORNIA STATE BAR COURT DUE PROCESS WAS DENIED RESULTING IN AN UNFAIR HEARING

A. The Applicant A Case Was Disregarded

Prior to the California State Bar Court's proceedings against petitioner, that court had published its decision in In the Matter of Applicant A (California State Bar Review Dept. 1995) 3 Cal. St. Bar Ct.Rptr. 318, 322, 332. Briefly that case requires a "fairness" hearing and assessment of claimed defects before preclusive effect can be given to a judgment which would be of a type that reflects adversely on one's fitness to practice law. The same unfairness test was required in Bar Counsel v Bd. Of Overseers (1995), 420 Mass. 6 [647 N.E. 2d 1182]. The test is outline at *Rest. Judgments* 2d §§ 27 and 29.

The State Bar Court trial judge said, "I am not going to rule on whether you had a fair trial." (State Bar Court hearing transcript II 37:18-19) contrary to In the Matter of Applicant A (*Supra*). The Review Department agreed (at In The Matter of Berg 3 (Review Dept. 1997) State Bar Court Reporter 725, 732, top of the page) thus trashing the Applicant A case.

B. Summary Of An Unfair State Bar Court Trial

After The Unfair Civil Trial

The California State Bar Court received into evidence in petitioner's disbarment case the fraud judgment, all of the pleadings filed in the Superior Court, and all of the Court Reporter's transcripts in the case of TDIC v Berg, San Francisco Superior Court no. 896838. That civil case was unfair (as shown above) because petitioner was forbidden the defense that no damages were suffered (a complete defense to a fraud claim). That defense would have proved work during a two-and-a-half years period which the state court held was not admissible by misinterpreting California's then-new independent counsel statute, California Civil Code § 2860.[11] The ruling was that none of petitioner's work after the effective date of the cut-off letters was admissible in evidence. Two-and-a-half years of work on those 40 cases was not available to petitioner to prove that he did the work for which he billed and was paid, nor was he allowed to prove that the work was needed because of the conflicts of the insurance company's selected lawyers. On appeal the exclusion of all that evidence of that work or the need for it was upheld through a strange judicial unpublished re-writing by the California Court of Appeal of the new independent counsel statute (described at page 25 paragraph 10 hereof) which has never been repeated--it was custom-made only for Mr.. Berg's case. This court did not grant review of that gross re-writing of Civil § 2860. (See

---

11 See page 25 at paragraph 10.

AO 57488)

C. **The Judgment In the Unfair State Civil Cade (TDIC v. Berg) Was not Entitled to Preclusive Effect In The California State Bar Court**

The proceeding against petitioner in the California State Bar Court are in need of California Rules of Court, Rule 954 review because: 1) important questions of law such as applicability of *Rest. Judgment* 2d § 29 and a unique interpretation of Civil Code § 2860 on one unpublished case, 2) petitioner did not receive a fair hearing for many reasons discussed herein,[12] 3) the little bit of evidence permitted in the State Bar court which was presented in the stingy hour petitioner was granted by the State Bar judge for mitigation was probative, and there is no evidence to refute that petitioner did the work for which he was paid, thus the decision that petitioner committed fraud is not supported by the weight of evidence in the State Bar Court, and 4) the discipline of disbarment is not appropriate in view of the fact that the work

---

12 A few of them are listed in ft. nt.4 at page 5 hereof. Regarding cutting mitigation from the day-and-a-half allotted to a single hour this court should know that the State Bar Court trial judge had received petitioner's outline with over 400 citations to documents in evidence showing his work for over two- and- a- half-years after the "cut off" in more than 40 cases plus 300 administrative claims and some related civil litigation which obviously petitioner could only begin to present in the scant hour allotted to him by the State Bar judge becuase each of the 400 references highlights a constilation of petitioner's work events each of which needed evidentiary discussion.

was needed, done very well, and fully worth the fee.

E. Facts which prove unfairness in the State Bar Court trial of count 1:

1. Petitioner was forbidden any defense to the disbarment charge (count 1); instead, the civil fraud judgment in the TDIC v. Berg, the underlying San Francisco Superior Court case, was given preclusive effect.

This judgment was unfairly procured by excluding most of petitioner's defense(due to misinterpretation of new statute California Civil Code § 2860) in violation of statutory interoretation rules as expressed in McAlexander v Siskiyou Joint Community College (1990) 222 Cal. App. 3d 768, 775 [272 Cal.Rptr. 70, 93].

The State Bar Court did not make a "fairness" evaluation of that prior civil judgment before it can be given preclusive effect. In the Matter of Applicant A (*Supra.*) Instead, the State Bar Court hearing judge ruled, "I'm not going to rule on whether you had a fair trial. I think the Court of Appeal did that."[13]

The State Bar Court Review Department quoted that ruling with approval (at Exhibit D page 725, top of the first column). The issue was raised in the appeal to the Review Department and the ruling inconsistent with the published

---

13 Judge Brott knew that the Court of Appeal re-wrote § 2860 because that issue is raised in petitioner's State Bar Court trial brief (at page 6:20-23 to 14:2, and 19:12-19) and in pre-trial proceedings in the State Bar Court.

Applicant A case. There was no explanation for refusal to follow established law. (Compare People v Curvas 12 Cal. 4th 252, 269 [48 Cal.Rptr. 2d 135, 146] (1995), substantial changes in the law applicable to a new case should be explained and justified in the opinion.)

2. Although petitioner required several days to present a substantial body of evidence proving "mitigation," by showing he did the work for which he was paid, the State Bar hearing judge only permitted a *single hour* to petioner for the purpose of bringing into evidence two-and-a-half years of his work after the "cut-off" letters in over 40 suits, about 300 administrative claims, two civil actions, and two administrative law proceedings which had been excluded from the civil case described in section 5(a) above. Rigid and inflexible hour limits on trial are generally disfavored. Monotype Corp. v International Typeface Corp. 43 F.3d 443, 450-1 (9th Cir. 1994) citing Flaminio v Honda Motor Co. 733 F. 2d 463, 473 (7th Cir. 1984)).

3. Petitioner's dentist/clients insured by TDIC were entitled to have TDIC pay for the service of their independent counsel to the end of all the malpractice cases against them. The dentists were charged with intentional torts and unlawful acts (willful acts done with knowledge they would cause harm and use of unlicensed helpers to perform license-required health care activities).

This activities, if proved, were acts for which indemnification by their insurer, TDIC, could denied pursuant

to California Insurance Code §§ 253 and 533 as well California Code of Civil Procedure §§ 1029.8 and 1668. Under these circumstances, if TDIC's appointed lawyers controlled the defense they could "tip" the results into "uncovered" outcomes. (See Taylor v Superior Court (1970 24 Cal. 3d 895, 905 [157 Cal. Rptr. 693, 702, 704], and Waller v Truck Insurance Exchange (1995) 11 Cal. 4th 1, 33-34 [44 Cal. Rptr. 2d 370, 388]) Petitioner Continued to represent these clients to the end despite TDIC's efforts (and their civil suit against petitioner filed during the pendency of the suits against petitioner's client) until the cases were settled with TDIC paying all the indemnification because resisted TDIC's efforts to deprive his clients of insurance coverage for their acts to the very end.

4. The State Bar judge commented on the record during petitioner's trial at II 33:21-24 that he was of the opinion that TDIC's appointed lawyers, Bradley & Curley, were in conflicts-of interest with petitioner's dentist/client based on evidence of the conduct of his client which emerged as those cases developed.

5. There is no statute, court rule, or published case decision of a constitutional court which provides that contrary to the "prepondence" of evidence standard of California Evidence Code § 115 and California State Bar Court Rules, Rule 214 the mitigation burden of proof on the lawyer in the State Bar Court disbarment proceeding is "clear and convincing" evidence which the State Bar trial judge imposed

and which the Review Department approved. (see Exhibits D page 733. second full paragraph.) That burden of proof on the lawyers is an invention of the State Bar Court with no published encouragement form this court.

6. During petitioner's appeals and request for review in the State Bar Court he claimed the State Bar judge made "findings" of against him on nine issues for which there is no evidence in the record.

7. The Office of trial Counsel of the State Bar of California did not refute petitioner's contentions that the said finding were not supported in the record by citing the record as to each of said findings to demonstrate that there is a factual basis for those findings. The reason? Nothing in the record supports them.

8. Petitioner was prejudicial in presenting his mitigation defense bacause his time to do so was reduced from the-day-and-a-half which had been scheduled to a single hour despite receipt in advance of the trial by the State Bar Court Hearing Department judge of a detailed 26 page outlying of 4- and-a-half years of activity on over 40 dental malpractice suits petitioner was defending and much other work which would be the subject of testimony showing petitioner did the work for which was paid, and the fee was not unconscionable.

9. In the Status conference Bar Court petitioner filed and unopposed 44 page declaration plus exhibits that demonstrate the unfairness of the TDIC v. Berg civil trial and legal briefs that show how the law was misinterpreted to achieve the unfair civil

court judgment by denying him the defense that TDIC suffered no damages because petitioner did the work for which he billed and was paid.

10. `The decisions of the California State Bar Court and the Review Department do not address the California Court of Appeal's misinterpretation of Civil Code § 2860 (at ¶6 on page 9-10 thereof) to require "direct evidence" of conflicts-of-interest before an insured is entitled to have his insurance company pay for indenpendence counsel as provided by California code § 2860 which requires independent counsel or a written waiver of that right when a possible conflict may arise or does exist."[14]

11. If petitioner's advance bill to TDIC themselves (most of which said 'pleading recieved" day, line after line on the bills) were so improper that based on them disbarment could be appropriate under California law for obtaining an unconscionable fee, petitioner was entitled in the California State Bar Court to a trial on that issue in the case-in-chief where the burden of proof by "clear and convincing" evidence was upon the State Bar, and petitioner would have the right to a defense on the merits at s debtor move trial in which evidence of <u>all</u> his work would be admissible. (Rules of Procedure of the California State Bar Court. Rule 213)

---

[14] That misinterpretation and re-writing of Civil Code §2860 allowed the appeal court to sidestep. Ca. Const. Art. 1 § 9 and U.S. Constitution Art. 1 § 10's prohibition against statutory impairment of contracts by changing the threshold for required independent counsel by raising the level of facts which trigger that right.

12. In the civil case TDIC v. Berg and in the State Bar Court case there is no evidence that before petitioner billed, TDIC set billing standards.

13. The California State Bar Court is obligated to impose the law established by published decisions of the California Supreme Court including Edmodson v. State Bar (1981) 29 Cal. 3d 339, 343 [172 Cal. Rptr.899, 901] which held that unimpeached testimony of the licensee can not be "arbitrarily disregarded," and Maltaman v. State Bar (1987) 43 Cal. 3d 924,931 [239 Cal. Rptr 687 689] which holds that where the evidence is not "clear and convincing" against the licensee all doubt must be resolved in favor of the licensee. Neither of these decisions was applied in petitioner's matter in the State Bar Court system.

14. In People v. Cuevas (*supra*) this court held that abandonment of settled law requires a written explanation. Although the California State Bar court refused to apply settled law which favors petitioner regarding every significant issue in his matter, no explanation was provided be the State Bar Court for this wholesale abandonment of existing law.

15. The State Bar Court Hearing Department did not re-open the evidence in the case-in -chief as to count I, which would have allowed petitioner to present his defense, but nevertheless it made new fact findings adverse to petitioner by reweighing the disputed evidence in the state court trial record despite the fact that petitioner had not been allowed to present evidence relevant to the State Bar's charges in the underlying

civil case.

F. **Expert Opinion**

The State Bar Review Department (at Exhibits D, page 731) recited that in the state court civil trial plaintiff's expert testified (in a sweeping general statement not supported by a factual discussion of his reasoning) that in his opinion petitioner's work was worth between $10,000 and $50,000. That testimony did not consider the two-and-a-half years of petitioner's excluded work of the undisputed itemized bills for work of Mr.. Berg and several of his employee associate lawyer which totaled just under $180,000 and were in evidence in the civil case and in the California State Bar Court Which that expert did not challenge during the civil trial.

The expert's opinion is not supported by any recitation that he read petitioner's files, the court defense counsel' files, or any file to make an evaluation of the work, nor did he talk to petitioner o his clients or the claimant's lawyers in those cases to find out what work petitioner performed and what results he achieved.

Lack of research about petitioner's work before arriving at his expert opinion undermines not only the value of that opinion but its admissibility. In a federal action that opinion would be stricken for lack of probative force because there is no reasonable factual basis for the opinion. (see Federal Rules of Evidence, Rules 401 and 402, Wright & Miller, *Federal Practice & Procedure* § 6671 note 8.) Relevant testimony from a qualified expert is admissible only if the expert knows of facts which

enable him to express a reasonably accurate conclusion as opposed to conjecture or speculation. Horton v. W.T. Grant Co.. 537 F.2d 1215,1218 (4th Cir. 1976). the value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. Pacific Gas and Electric Co.. v. Zuckerman (1987) 189 Cal. App. 3d 1113,1135 [234 Cal.Rptr. 630]. And see People v. Johnson (1980) 26 Cal. 3d 557, 576 [162 Cal Rptr.431] which holds, to be considered substantial, evidence must be "of ponderable legal significance... reasonable in nature, credible, and of solid value."

An expert report prepared for litigation must be considered with skepticism. (see,Daubert v. Merrill Dow Pharmaceutical Inc.. 43 F.3d 1311,1317 (9th Cir.1995).)

H. State Bar Cost Claim Violated California Rules of Court

In May 13,1998 the California State Bar Court filed a "certificate of costs" seeking $5,042.31 against petitioner. the practices of that court in connection with this cost claim reflect further upon the fundamental unfairness of the California State Bar Court's procedure in every aspect of petitioner's disbarment. That cost claim was Improper because :

a. it was untimely. California Rules of Court, Rule 870(a)(1) outlaws a cost certificate not filed within 15 days after the Supreme Court's Of Judgment,

b. it was not verified as required by Rule 870(a)(1),

c. it was not supported by a sworn statement relating the charges to that case as required by Rule 870(a)(1), and

d. it was not signed by someone who had personal knowledge that the charges were related to the case as required by Rule 870(a)(1).

The imposition of "costs" upon one who defends against effort to disbar him is an unconstitutional burden on the exercise of the right to defend one's livelihood. (see Rankan v. Independent School Dist. (10th Cir. 199) 876 F2d 838, cert, denied (1992) 491 U.S. 1068, and see Boddie v. Connecticut (1971)401 U.S. 371 [91 S. C.T..780].)

The June 22, 1998 order that ruled the objection was due by April 24, 1998 violates due process. The objectionable cost

certificate was not filed until May 13, 1998, more than two weeks after the last day said order requires an objection to said bill. (see Justice Werdeger's comment to this court's denial of review in S064786.) August 10, 1998 the California State Bar Court Review Department affirmed the State Bar court Hearing Department's June 22, 1998 order without addressing any of the issues outlined which were asserted in petitioner's grounds for review in briefs submitted to the California to the California State Bar Court Review Department.

Appendix G

Excerpts of Petition

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re the Matter of JEROME BERG

Nos. S064786

PETITIONER'S VERIFIED

RESPONSE TO STATE BAR'S

LETTER BRIEF OF APRIL 14, 2000

State Bar Court Case Nos.:

92-0-11504 EEB,

92-0-014486 EEB

SUPREME COURT
FILED
APRIL 25, 2000

Frederick K. Ohirich Clerk
Deputy

Robert Rudolph, Esq.

State Bar No. 142252

1255 Post Street, Suite 606

San Francisco, CA 94109

App. 80

At page 1

II. WHAT IS "PLENARY" JUDICIAL REVIEW"?

In Rose (*supra.*) this court affirmed the right to an independent examination of the serious discipline recommnedations of the State Bar Court in this court. The absence of a right to an independent examination by this court of recommendations of the attorney discipline system would raise the contitutional question of delegation of judicial authority to the statutory (advisory) State Bar Court.

at page 2

The State Bar Trial Counsel in its April 14, 2000 letter brief, Judge Obrien, and the anti-143 *amici* in Obrien *et al* v Secretary of State, *et al*. (S085212) all have a vested interest in a system of attorney discipline where a few non-constitutional officials have almost absolute power to end the professional lives of 170,000 lawyers, with all the potentials for abuse predicted by Lord Acton.

App. 81

at page 4

V. THE STATE BAR OFFICE OF TRIAL COUNSEL DOESN'T CONTEST THAT Mr. BERG HAS DEMONSTRATED THAT THIS IS A MERITORIOUS CASE ON ITS FACTS

Answering petitioner's *amicus* brief in Paguirigan (Exhibit H to the rehearing petition) where petitioner outlined the due process and other unfair acts of the State Bar Court (including cutting his time to 90 seconds per case to prove he gave full value and this did not obtain an unconscionable fee in over 40 cases he defended) which resulted in a clearly unfair disbarment recommendation in his case, the State Bar's Office of Trial Counsel provided no rebuttal except to say in a general way that the State Bar Court "always" allows adequate time for defense. (See the State Bar's, Paguirigan letter brief, "Exhibit I" at mid page 3 to Mr. Berg's petitioin for rehearing)

Petitioner's *amicus* brief in Obrien, outlines this same list of facts which prove an unjust process and an unjust recommendation of disbarment. Because no one can provide a credible refutation of the abuses by the State Bar Court which

Mr. Berg demonstrated, either Judge Obrien nor any of his numerous *amici* stood up to deny Mr. Berg's demonstration of that court's abuses.

The State Bar Trial Counsel in the present matter also signed the State Bar's Paguirigan letter brief. Now a year later the same ugly facts which prove the pervasive abuse of power by the State Bar Court in Mr. Berg's case remain unrefuted.

Isn't it fair to say that with all this time to address serious, well-documented proof that an injustice was done to petitioner, and the occurrence of three very public occasion (Rose, Paguirigan and Obrien) in addition to Mr. Berg's case in which petitioner banged the drum to emphasize the abuses, it's time to rule that Judge Obrien and the State Bar have defaulted, and now they must be deemed to have admitted the truth of their unjust conduct and recommendation for disbarment? Silence in the face of damming accusations under circumstances where the statement is made in a public way which would prompt an innocent party to express denial are admissions as defined by Evidence Code 1221. (See Henderson v Northham (1917) 176 Cal. 493 [168 Pac. 2d. 2d. 1044]